

**TRANSCRIPT OF RECORD**

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**SUPREME COURT OF THE UNITED STATES**

**October Term, 1950**

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**No. 23**

**THE UNITED STATES OF AMERICA, PETITIONER**

**vs.**

**MUNSINGWEAR, INC.**

**No. 24**

**THE UNITED STATES OF AMERICA, PETITIONER**

**vs.**

**MUNSINGWEAR, INC.**

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**On Writs of Certiorari to the United States Court  
of Appeals for the Eighth Circuit**

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**PETITION FOR CERTIORARI FILED MARCH 4, 1950**

**CERTIORARI GRANTED, APRIL 24, 1950**

**United States Court of Appeals**  
**EIGHTH CIRCUIT**

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**No. 13,875**

**CIVIL**

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**UNITED STATES OF AMERICA,**  
**APPELLANT,**

**vs.**

**MUNSINGWEAR, INC., A CORPORATION,**  
**APPELLEE.**

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**No. 13,876**

**CIVIL**

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**UNITED STATES OF AMERICA,**  
**APPELLANT,**

**vs.**

**MUNSINGWEAR, INC., A CORPORATION,**  
**APPELLEE.**

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**APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES**  
**FOR THE DISTRICT OF MINNESOTA.**

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**FILED NOVEMBER 26, 1948.**

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[fol. 1] (Complaint in Case No. 1147, Civil.)

In The District Court of The United States  
For The District Of Minnesota  
Fourth Division

Chester Bowles, Administrator, Office Of Price Adminis-  
tration, Plaintiff,

No. 1147. vs. Civil Action.

Munsingwear, Inc., a corporation, Defendant.

Count One.

1. In the judgment of plaintiff, as Price Administrator, the defendant has engaged in acts and practices which constitute violations of Section 4 (a) of the Emergency Price Control Act of 1942, as amended (50 U.S.C.A., App. Sec. 901-946), 961-971), hereinafter called the Act, in that the defendant has violated Maximum Price Regulation No. 221, as amended; pursuant to Section 205 (a) of the Act, plaintiff brings this action to enforce compliance with said regulation.

2. Jurisdiction of this action is conferred upon this Court by Section 205 of the Act.

3. At all times hereinafter mentioned there has been in effect, pursuant to the Act, Maximum Price Regulation No. 221, 7 F. R. 7318, as amended; establishing maximum manufacturers' prices for fall and winter knitted underwear.

4. The defendant is a corporation incorporated under the laws of the State of Delaware and has its principal place of business at 718 Glenwood Avenue in the City of Minneapolis, County of Hennepin, and State of Minnesota, within the jurisdiction of this Court. At all times herein mentioned the defendant has been engaged, and is now engaged, in the manufacture of underwear in the City of Minneapolis and in the sale of said underwear in this district and elsewhere.

5. Maximum Price Regulation No. 221, as amended, provides in part as follows:

[fol. 2] "1389.302 Maximum Prices For Manufacturers Of Fall And Winter Knitted Underwear—(a) How a manufacturer establishes his maximum price. Subject to the provisions of paragraphs (b) and (c) of this section, a manufacturer's maximum price to purchasers of the same class for any garment of fall and winter knitted underwear shall be established as follows:

(1) The manufacturer's maximum price shall be the highest price at which the manufacturer sold by written order or contract for the fall and winter season of 1942, the same garment of fall and winter knitted underwear after November 30, 1941 and before February 10, 1942; or

(2) If the manufacturer did not sell by written order or contract, for the fall and winter season of 1942, after November 30, 1941 and before February 10, 1942, the same garment of fall and winter knitted underwear, the maximum price for such garment shall be the price at which the same garment was first offered in the manufacturer's written or printed price list for the fall and winter season of 1942 which was distributed generally to the customers or prospective customers of the manufacturer on or before February 10, 1942; or

(3) If the manufacturer cannot establish a maximum price for any garment of fall and winter knitted underwear under paragraphs (a) (1) or (2) of this section, then the manufacturer's maximum price shall be 105% of the price at which the same garment was offered in the manufacturer's written or printed price list for the fall and winter season of 1941 which was in effect on July 15, 1941 and which was distributed generally to customers or prospective customers of the manufacturer."

"1389.303 Maximum Prices For Fall And Winted Knitted Underwear Which Cannot Be Priced Under PP1389.302. The seller's maximum price for any garment of fall and winter knitted underwear which cannot be priced under PP1389.302 shall be a maximum price in line with the level of maximum prices established by this Maximum Price Regulation No. 221 which shall be determined by the

seller after specific authorization from the Office of Price Administration. A seller who seeks an authorization to determine a maximum price under the provisions of this subparagraph shall file with the Office of Price Administration, Washington, D. C. an application under oath \* \* \*."

Section 1389.307 of said regulation further provides that each manufacturer of fall and winter knitted underwear shall file certain statements and reports with the Office of Price Administration, containing certain specified information.

6. The defendant did not, during the period November 30, 1941, to February 19, 1942, make any sales of fall and winter knitted underwear by written order or contract for the fall and winter season of 1942, and, therefore, does not come within the provisions of Section 1389.302 (a) (1).

[fol. 3] 7. The defendant did not have a written or printed price list for the fall or winter season of 1942 which was distributed generally to the customers or prospective customers of defendant on or before February 10, 1942, and therefore, the defendant does not come within the provisions of Section 1389.302 (a) (2).

8. The defendant is purporting to come within the provisions of Section 1389.302 (a) (2) as to certain items of fall and winter knitted underwear manufactured by it, by virtue of two price lists which it printed and distributed subsequent to February 10, 1942. One of said price lists is designated as "Women's and Children's Underwear, Prices as of February 9, 1942". The other of said price lists is designated as "Men's and Boys' Underwear, Price Revisions, Prices Effective February 2, 1942". Neither of said price lists are price lists for the fall and winter season of 1942, and neither was printed or distributed prior to February 10, 1942. Both of said price lists contain items of fall and winter knitted underwear, and the selling prices therein stated for said items of fall and winter knitted underwear are higher than 105 per cent of the selling prices for the same garments stated in defendant's printed price list for the fall and winter season of 1941 which was in effect on July 15, 1941, and which was distributed generally to customers and prospective customers of the defendant.



9. Subsequent to November 18, 1942, the defendant has been continuously selling, and offering to sell, certain garments of fall and winter knitted underwear at the selling prices stated in the two price lists referred to in Paragraph 8, supra, is still doing so, and threatens to continue to sell said garments at said prices in the future. Under the provisions of Section 1389.302 (a) (3) of said regulation, the defendant's maximum prices for fall and winter knitted underwear are 105 per cent of the prices listed for the same garments in defendant's printed price list for the fall and winter season of 1941.

10. The defendant has never applied to the Office of Price Administration for authority to determine any maximum prices for fall and winter knitted underwear pursuant to Section 1389.303 of said regulation.

11. The defendant has never filed with the Office of Price Administration the statements and reports required to be filed under the provisions of Section 1389.307 of said regulation.

[fol. 4]

### Count Two.

1. Plaintiff, as Administrator of the Office of Price Administration, brings this action with respect to Count Two for treble damages on behalf of the United States, pursuant to the provisions of Section 205 (e) of the Emergency Price Control Act of 1942 (56 Stat. 23; 50 U.S.C.A. App. Sec. 901-946) as amended by The Act of October 2, 1942 (56 Stat. 765; 50 U.S.C.A. App. Sec. 961-971), said Act, as amended, being hereinafter called the Act.

2. Jurisdiction of this action is conferred upon this Court by Section 205 of the Act.

3. Paragraphs 3 to 10, inclusive, of Count One are incorporated herein by reference as if fully set forth herein.

4. All of defendant's sales of fall and winter knitted underwear were made to dealers who purchased in the course of trade and business for the purpose of resale.

5. The defendant's sales are made throughout the United States. The exact number of sales made by the defendant at prices in excess of the maximum prices, the dates of said sales, the names of the purchasers, and the

precise amounts by which all of the prices charged and received by defendant exceeded the maximum price are unknown to plaintiff at this time. All of said information is ascertainable from the defendant's records. Because of the tremendous volume of business transacted by defendant, the ascertaining of said facts from defendant's records will involve a great deal of time, manpower and expense, all of which would be to no purpose until the Court determines the other issues involved in this action. Furthermore, if the commencement of this action were delayed until all of said facts were ascertained, plaintiff's right of action as to many of defendant's sales made within one year prior to this date would be barred by the limitation of action provision contained in Section 205 (e) of the Act.

Wherefore, the plaintiff demands that the Court adjudge:

[fol. 5] 1. that the defendant's maximum prices for its garments of fall and winter knitted underwear are 105 per cent of the prices for the same garments as stated in defendant's printed price list for the fall and winter season of 1941;

2. if the Court should adjudge for any reason that the defendant's maximum prices are not established by Section 1389.302 (a) (3), that the defendant be ordered and required to apply to the Office of Price Administration for authorization to determine maximum prices for its garments of fall and winter knitted underwear as provided by Section 1389.303 of said regulation, and that the defendant be enjoined from making sales of any garments of fall and winter knitted underwear until maximum prices for such garments are duly determined pursuant to the provisions of said Section 1389.303;

3. that the defendant be permanently enjoined from selling or offering or attempting to sell fall and winter knitted underwear or any other commodity at prices in excess of the maximum prices properly established pursuant to Maximum Price Regulation No. 221, as amended, or any other regulation;

4. that the defendant be ordered and required to immediately file with the Office of Price Administration the statements and reports containing the specific information re-



quired by Section 1389.307 of Maximum Price Regulation No. 221, as amended;

5. that the defendant be ordered and required to keep and maintain all of its records as to sales of fall and winter knitted underwear and to produce them and permit their inspection by employees of the Office of Price Administration for the purpose of determining the exact extent and amount of the overceiling charges made and collected by the defendant on garments of fall and winter knitted underwear;

6. that the plaintiff have judgment for and on behalf of the United States against the defendant for three times the aggregate amount by which the prices demanded and received by the defendant for the garments of fall and winter knitted underwear, so sold as aforesaid, exceeded the applicable maximum prices established therefor by Maximum Price Regulation No. 221, as amended, but not less than \$50.00, and costs, according to Section 205(e) of the Act;

7. that plaintiff have such other and further relief as to the Court may seem just and equitable.

Dated this 8th day of June, 1944.

ALEX ELSON,  
Regional Attorney,

RALPH M. McCAREINS,  
District Enforcement Attorney,

HYMEN L. GREENBERG,  
Enforcement Attorney,

c/o Twin Cities District Office,  
Office of Price Administration,  
W-1200 First National Bank  
Bldg.,  
St. Paul 1, Minnesota,  
Attorneys For Plaintiff.

Endorsed: Filed in U. S. District Court on June 9, 1944.

[fol. 6] (Answer In Case No. 1147, Civil)

Defendant for its answer to the complaint of the plaintiff alleges:

Count One.

I.

In answer to paragraph 1 of the complaint, defendant denies that it has engaged in acts or practices which constitute a violation of Section 4 (a) of the Emergency Price Control Act of 1942, as amended, by violating Maximum Price Regulation #221, as amended, or any other price schedule or regulation promulgated under said Act.

II.

In answer to paragraph 2 of the complaint, defendant admits that according to the provisions of Section 205 (c) of the said Emergency Price Control Act of 1942, as amended, the District Courts of the United States are given jurisdiction concurrently with State and Territorial Courts over acts to enjoin violations of said Act or price regulations, orders, or schedules issued by the Price Administrator of the Office of Price Administration pursuant to said Act. Defendant, however, denies that it has violated said Act or any Price order, regulation, or schedule issued pursuant to said Act.

III.

In answer to paragraph 3, defendant alleges that the Price Administrator (also known as the Administrator) of the Office of Price Administration issued a number of price regulations prescribing maximum prices at which manufacturers were permitted to sell fall and winter knit underwear, and that said regulations were issued pursuant to the authority purportedly vested in the Administrator by the Emergency Price Control Act of 1942. Whether the maximum price regulations hereinafter mentioned were issued and effective pursuant to actual authority vested in the Administrator by said Act, defendant is without knowledge or information sufficient to form a belief. The regulations, material here, so issued were the General Maximum Price Regulation issued and effective on about May 11, 1942, Maximum Price Regulation #221 issued and

effective on September 15, 1942, and amendment #1 to [fol. 7] Maximum Price Regulation #221 issued November 18, 1942 and effective November 23, 1942.

#### IV.

Defendant admits paragraph 4 of the complaint, and alleges that it is engaged in the business of manufacturing, among other things, under-garments for men, women, and children, including garments known and described as fall and winter type knit underwear, also sometimes described as heavy weight and winter weight knit underwear. Defendant further alleges that it has been engaged in such business for about 58 years, and has built up a substantial and responsible business organization employing in its plant at Minneapolis a large number of artisans, office employees, salesmen, and executives. Defendant also alleges that its products are sold to retail stores and mail order houses; and that the market for its goods extends throughout the United States and its possessions.

#### V.

In answer to paragraph 5 of the complaint, defendant alleges that under and pursuant to the General Maximum Price Regulation issued and effective on about May 11, 1942, the Administrator of the Office of the Price Administration established maximum prices on defendant's sales of fall and winter knit underwear at the highest prices charged by defendant for products delivered by it during the month of March, 1942. The defendant alleges that it did all in its power to comply with said regulation, and to the best of its knowledge, information and belief it has fully complied with said regulation, which continued in effect until September 15, 1942. On the last mentioned date, the General Maximum Price Regulation was superseded by Maximum Price Regulation #221, which imposed new price formulas on the sale by manufacturers of fall and winter knit underwear. By said Maximum Price Regulation #221 three maximum price formulas were imposed on manufacturers by Sec. 1389.302, which reads as follows:

"1389.302 Maximum prices for manufacturers of fall and winter knitted underwear—(a) How a manufacturer establishes his maximum price. Subject to the provisions of paragraph (b) and (c) of this section, a manufacturer's maximum price to purchasers of the same class for any garment of fall and winter knitted underwear shall be established as follows:

(1) The manufacturer's maximum price shall be the highest price at which the manufacturer sold by written order or contract the same garment of fall and winter knitted underwear after November 30, 1941 and before February 10, 1942; or

(2) If the manufacturer did not sell by written order or contract, after November 30, 1941 and before February 10, 1942, the same garment of fall and winter knitted underwear, the maximum price for such garment shall be the price at which the same garment was first offered in the manufacturers written or printed price list for the fall and winter season of 1942 which was distributed generally to the customers or prospective customers of the manufacturer or before February 10, 1942; or

(3) If the manufacturer cannot establish a maximum price for any garment of fall and winter knitted underwear under paragraphs (a) (1) or (2) of this section, then the manufacturer's maximum price shall be 105% of the price at which the same garment was offered in the manufacturer's written or printed price list for the fall and winter season of 1941 which was in effect on July 15, 1941 and which was distributed generally to customers or prospective customers of the manufacturer."

Defendant admits that by Sec. 1389.307 of said regulation #221 every manufacturer selling or offering for sale fall and winter knit underwear was required to file a statement or report with the Office of Price Administration in Washington, D. C. on or before November 15, 1942, (later extended by amendment to December 15, 1942), showing the maximum prices established under said regulation for each garment of fall and winter knit underwear copies of written orders or contracts entered into during the base period of November 30, 1941 to February 10, 1942,



and the printed or written price lists distributed to the trade. Every manufacturer was also required to file a report, which, by amendment, was required to be filed on or before January 15, 1943, on forms to be prescribed and in such detail as might be required by the Office of Price [fol. 9] Administration regarding selling prices, garment descriptions, assembly, finish, description, and costs of garments manufactured and sold. Defendant also alleges that by Sec. 1389.308 of said regulation every manufacturer on or before October 1, 1942, was required to notify each person who had bought from him for the fall or winter season of 1941 or 1942 that the purchaser was required to price his garments in accordance with Maximum Price Regulation #210 (Retail and Wholesale Prices for Fall and Winter Seasonal Commodities) and was required to supply such purchasers with the text of Amendment #1 and Maximum Price Regulation #210. By Sec. 1389.309 of said regulation the manufacturer was also required to disclose to purchasers within ten days of request therefor the maximum price established for him with regard to a garment sold or delivered.

## VI

Defendant denies paragraph 6 of the complaint, and alleges that it did make sales of fall and winter knit underwear pursuant to written orders received by it during the base period of November 30, 1941 through February 10, 1942, as provided in Sec. (a) (1) of Sec. 1389.302 of said regulation, hereinafter sometimes referred to as formula #1. Defendant alleges that a complete report has been submitted to the Office of Price Administration, consisting of a tabulation of some 2,016 individual stock number cards representing shipments against orders booked between February 6, 1942 and February 10, 1942, as hereinafter explained. Said tabulation shows that all the separate styles of fall and winter weight knit underwear manufactured by the defendant were sold pursuant to written orders booked during the aforementioned base period, excepting only nine style numbers which were included in the price lists hereinafter mentioned and covered by Sec. (a) (2), of Sec. 1389.302 of said regulation, sometimes hereinafter referred to as formula #2. De-

defendant's maximum prices therefor were established pursuant to the aforementioned formula #1 and formula #2 of Maximum Price Regulation #221, as hereinafter explained.

Defendant alleges that on November 18, 1942, the Administrator of the Office of Price Administration issued [fol. 10] Amendment #1 to Maximum Price Regulation #221, said amendment to become effective on November 23, 1942. Said amendment amended formula #1 by inserting the words "for the fall and winter season of 1942" after the words "written order or contract" in the third line commencing with the beginning of the paragraph. Contemporaneously with and as a part of said amendment #1 the Office of Price Administration issued an official interpretation of general applicability for the guidance of the public including this defendant with reference to said amendment. The interpretation was given out as an advance release for the Wednesday afternoon papers for November 18, 1942. Under the title, "Changes Affecting Manufacturers", the Administrator of the Office of Price Administration made the following statement with respect to the intent and purpose to be affected by the amendment of formula #1:

"Under the regulation, ceiling prices for manufacturers are established at the prices at which written orders were booked during the period from December 10, 1941, to February 10, 1942. Today's amendment makes clear that manufacturers are to establish their maximum prices on the basis only of written orders or contracts booked during the specified base period for the 1942 fall and winter season.

This change, OPA explained, takes care of situations when certain manufacturers during the base period accepted only orders for certain of the garments covered by the regulation which were "fill-in" orders based on the level of costs and prices for the 1941 season."

The expressed purpose and intent of Amendment #1 as aforementioned was to give financial relief to those manufacturers whose prices were established by fill-in orders under formula #1 at the low level of prices based

on the low production costs prevailing during the 1941 fall and winter season, or, in other words, to relieve manufacturers who had failed to make an adjustment to known increases in 1942 production costs in orders booked by them during the base period of November 30, 1941 to February 10, 1942. The same interpretation was given out in the Statement of Considerations made by the Administrator [fol. 11] in connection with and as a part of said amendment. By Sec. 1 of the Emergency Price Control Act of 1942, as amended, every regulation or order issued by the Administrator must be accompanied by a Statement of Consideration involved in the issuance of a regulation or order. Trade publications, notably, the Journal of Commerce of New York, on November 19, 1942, and daily newspapers published the same expression of intent and purpose.

Defendant alleges that its maximum prices continued to be covered by formula #1 and formula #2, after amendment of said regulation by Amendment #1. In January of 1942 and prior to the enactment of the Emergency Price Control Act and the creation of an Office of Price Administration thereunder, it became apparent to the defendant that its customers were buying in volume far in excess of the volume of purchases in former years. The increase in volume could be accounted for only by the fact that retailers were buying in advance of their current needs and were buying in anticipation of their ensuing fall and winter seasons. Defendant's level of selling prices in January, 1942, however, was fixed at manufacturing cost levels prevailing in the year 1941, and were not adjusted to the known increases in labor, material, and yarn costs which had occurred following the 1941 fall season. When defendant became fully aware of its customers' buying up for future needs the company's supply of goods made from low cost materials, it stopped the booking of all orders for fall and winter knit underwear on February 2, 1942. Thereupon, defendant promptly set about revising its prices to conform to higher costs of materials, and increases in labor costs which affected the goods for the fall and winter season of 1942. New price lists were prepared which reflected these increased costs, one such list being for men's and boys' fall and



winter knit underwear, and the other such list for women's and children's fall and winter knit underwear. The two lists were completed in draft form on about February 6, 1942, at which time written copies of the drafts were sent to the company's print shop, and written copies also were sent to the defendant's order department with instructions to book orders at the new prices, which had [fol. 12] accumulated in large volume from the time that the "stop" order had been given on February 2, 1942. Pursuant to said instructions the order department booked orders for all styles of fall and winter knit underwear covered by said new price lists, excepting nine as aforementioned, from February 6, 1942 and prior to February 10, 1942.

## VII.

The defendant denies paragraph 7 of the complaint, and alleges that the price lists mentioned in the above paragraph 6 were effective on February 2, 1942 for men's and boys' fall and winter knit underwear, and for women's and children's fall and winter knit underwear. Defendant further alleges that the price lists were drafted and employed in written form as the basis for pricing orders received prior to February 10, 1942, that the lists were used and employed as the exclusive lists for pricing heavy weight knit underwear produced by it, and that the words appearing on said lists "Available only for fill-in orders for immediate delivery" were not descriptive of the use to be made of the price lists. Defendant further alleges that the drafts of the price lists were delivered to the company's print shop which promptly started work on printing said lists and mailing them out to customers.

## VIII.

In answer to paragraph 8 of the complaint, defendant denies that its price lists were not for the fall and winter season of 1942, but alleges that said lists were used and employed for all purposes, i.e. determining prices for fill-in orders and for the regular fall and winter season of 1942. Defendant admits that all its price lists were not circulated throughout the trade in printed form prior to February 10, 1942, but it alleges that the new prices, evidenced by the written lists, were given orally, personally and by tele-

phone, to its customers which was in accordance with the company's practice of many years standing; that the new prices were given in the aforementioned manner to customers attending a market week at said time in Minneapolis and in Chicago, the exact number being unknown to defendant but defendant verily believes that there were many in attendance at these market displays, and to all [fol. 13] customers who sought the information; and that a number of said lists may have been mailed out in printed form to many of its customers on February 9 or 10, and as the printing progressed from day to day.

### IX.

In answer to paragraph 9 of the complaint, defendant denies that its prices were or could have been established under the so-called "third formula" of the regulation, namely, 105% of the price at which the same garments were offered for sale in the manufacturers written or printed price lists for the fall and winter season of 1941, which said lists were in effect on July 15, 1941, and which were distributed generally to customers or to prospective customers. Defendant admits that its prices were not based upon the third, or 105% formula, but it alleges that its prices are in accordance with the maximum prices at which orders were booked during the base period of November 30, 1941 to February 10, 1942, and in accordance with the price lists which were effective and in use prior to February 10, 1942.

### X.

In answer to paragraph 10 of the complaint, defendant admits that it has not applied to the Office of Price Administration under Sec. 1389.303 of Maximum Price Regulation #221 for a price which, in the words of the regulation, the Office of Price Administration is authorized to grant "in line with the level of prices established by this maximum price regulation". Said section of the regulation expressly provides that it shall apply only where the seller can not price under section 1389.302 of the regulation, whereas defendant's prices were established under Sec. 1389.302 and the first and second formulas thereof. Defendant further alleges that it would not only be contrary to the regulation to apply for a price from the Office of Price

Administration under Sec. 1389.303, but that it would be perfectly useless to seek such a price, for the reason that the Office of Price Administration would only be empowered to grant a price "in line" with the level of prices established under Sec. 1389.302, which, according to the wording of said Sec. 1389.303, would mean a price in line with the manufacturer's most comparable garment sold pursuant to written order or contract booked during the base [fol. 14] period, or a price in line with the most-nearly competitive seller of the same class who sold by written order or contract garments which were most nearly comparable to that for which a maximum price is sought. In short, the Office of Price Administration would be authorized to grant a maximum price under Sec. 1389.303 which would be in line with prices fixed by reference to a 1942 level of costs and not a level of costs confined to the 1941 fall season.

## XI.

In answer to paragraph 11 of the complaint, defendant denies that it never filed the statements and reports required to be filed by Maximum Price Regulation #221, but alleges that it did file with the Office of Price Administration in Washington, D. C. a full statement, including copies of the price lists setting forth the maximum prices charged by it, the formula under which it established its prices, and the distribution of said lists to customers. A copy of said statement is attached hereto, made a part hereof, and marked "Exhibit A". Defendant also filed with the Office of Price Administration in Washington, D. C. the reports on forms furnished by said Agency setting forth prices, garment description and costs of production. The report consisted of some four hundred separate sheets covering each style number manufactured by defendant. Exhibits B and C hereto attached and made a part hereof are examples of the forms filled out and filed with the Office of Price Administration.

## XII.

As a separate defense, defendant alleges that the said reports on forms furnished by the Office of Price Administration were mailed to the Office of Price Administration in Washington, D. C. on December 15, 1942, and that the

said statement was mailed to the Office of Price Administration in Washington, D. C. on December 17, 1942. After the filing of said statement personally addressed to Mr. Richard Leek in charge of knit underwear at the Office of Price Administration in Washington, D. C., and said report, the Office of Price Administration remained silent, and raised no objection to the maximum prices established by the defendant under Maximum Price Regulation #221, or the fact that defendant's prices were established pursuant to [fol. 15] formula #1 of the regulation or the price lists submitted with the report. The Office of Price Administration remained silent after receipt of said statement and report until some time in September, 1943, or for a period of approximately nine months from the date of said filing. By reason of the long silence of the Office of Price Administration defendant continued to believe and infer that its maximum prices were correctly established. The Office of Price Administration, by reason of its silence, acquiesced in and approved the prices established under the regulation. Defendant also alleges that it has become the practice of the Office of Price Administration to treat the filing of price lists, reports, and statements showing method of computing maximum prices by a seller as the act which conclusively establishes the prices set forth in the list, report, or statement unless the prices reported are questioned by the Office of Price Administration within either 20 or 30 days of the said filing. This treatment has been accorded to the drugs and cosmetics industry, malt beverage industry, farm equipment industry, industries dealing with food products and many other industries. If defendant is not accorded similar treatment under Maximum Price Regulation #221, then said regulation is arbitrary, capricious, and contrary to the Emergency Price Control Act of 1942, as amended, and denies defendant due process contrary to the Fifth Amendment of the Constitution of the United States.

### XIII.

If the Emergency Price Control Act of 1942 and the Maximum Price Regulation #221, as amended, be construed as depriving defendant of the maximum prices established by it on fall and winter knit underwear in accordance with formula #1 and formula #2 of said Maximum Price Regula-

tion #221, then said Act and the said Regulation issued thereunder will deprive defendant of property without due process of law contrary to the Fifth Amendment of the Constitution of the United States of America.

#### XIV.

Defendant alleges that it has conscientiously sought to comply with all of the price regulations issued by the Office of Price Administration which, as applied to defendant's [fol. 16] business, are complex and a multitude in number. Some 40% of the total production of defendant's business has been devoted to making of garments for the armed forces and the government, and this has also introduced matters of great complexity in its business. Defendant has also contributed 41% of its manpower to the armed forces and has been compelled to carry a greatly increased work load with fewer trained and experienced employees, particularly in the executive and clerical departments. Nevertheless, it has at all times endeavored to cooperate with the Office of Price Administration, and all demands for records and information which the Office of Price Administration has made upon the defendant. It established its prices pursuant to formulas #1 and #2 under Maximum Price Regulation #221 in good faith, and it reported its prices and its method of establishing such prices as required by the regulation to the Office of Price Administration in Washington, D. C. Defendant alleges that the injunction sought by the Office of Price Administration would cause irreparable damage to its business and to the good will which it has built up in its business over the past 58 years of its operations. Defendant respectfully prays that the Court deny the injunction sought by the Office of Price Administration and dismiss Count One of the complaint.

#### Count Two.

##### I.

In answer to paragraph 1 of Count Two of the complaint, defendant denies that the prices charged by it for fall and winter knit underwear exceeded the maximum prices fixed by Maximum Price Regulation #221, as amended.

In further answer to paragraph 1 of Count Two of the complaint, defendant alleges that Sec. 205 (e) of the



Emergency Price Control Act of 1942 was amended by Congress on June 30, 1944, so as to vest in the Court discretion in the allowance of damages where a seller exceeds maximum prices prescribed by order, regulation, or price schedule issued by the Administrator of the Office of Price Administration, and defendant alleges that the amendments of Sec. 205 (e) were made by Congress expressly [fol. 17] applicable to pending actions. Defendant denies that it violated Maximum Price Regulation #221 or amendments thereto issued by the Administrator, but alleges that, if it should be adjudged in error in the method of pricing which is established under Maximum Price Regulation #221, then defendant's error was made in good faith, by reason of the generally published interpretations of the regulation issued by the Office of Price Administration as set forth above in paragraph 6 in answer to Count One of the complaint, and by reason of the tacit approval of the formulas employed by defendant pursuant to the regulation and reported to the Office of Price Administration on or about December 15, 1942. Defendant, therefore, respectfully requests that the Court, in the exercise of its discretion, deny the plaintiff damages in any sum under Sec. 205 (e) of the Emergency Price Control Act, as amended on June 30, 1944.

## II.

In answer to paragraph 2 of Count Two of the complaint, defendant admits that the District Courts of the United States are vested with jurisdiction in suits brought by the Administrator under Sec. 205 (e), provided that such actions must be brought in the county or district where the defendant resides or has a place of business, an office, or an agent.

Defendant, in further answer to paragraph 2 of Count Two of the complaint, alleges that it was not guilty of violating Maximum Price Regulation #221 as originally issued or as amended, and the Court, therefore, has no jurisdiction of the subject matter of this action.

## III.

In answer to paragraph 3 of Count Two of the complaint, which incorporates paragraphs 3 to 10, inclusive, of Count One into paragraph 3 of Count Two of the complaint, de-

defendant does herewith incorporate its answering paragraphs III to XIII in this paragraph of its answer to Count Two of the complaint.

#### IV.

In answer to paragraph 4 of Count Two of the Complaint, defendant alleges that its sales of fall and winter knit [fol. 18] underwear were made to retail establishments which purchased from defendant for the purpose of reselling to their customers.

#### V.

In answer to paragraph 5 of Count Two of the complaint, defendant denies that it has charged more than the maximum prices established by Maximum Price Regulation #221, as amended, in its sales of fall and winter knit underwear, and alleges that there is no reason for or basis upon which the computation of alleged over-charges can or should be ordered by the Court.

#### VI.

As a separate defense, defendant alleges that the action sought to be maintained by the Administrator is barred by Sec. 205 (e) of the Emergency Price Control Act of 1942, as amended on June 30, 1944, which provides that an action for damages arising out of alleged violations of a maximum price regulation must be brought within one year from the date of the alleged violation.

#### VII.

As a further and separate defense, defendant alleges that its maximum prices were further established under Maximum Price Regulation #221 by the filing of the statement and reports on or about December 15, 1942 with the Office of Price Administration in Washington, D. C. that by reason of the long silence of the Office of Price Administration as before alleged, said Office approved the prices so established; and, therefore, it is now estopped by its laches from setting aside the maximum prices established by defendant and from maintaining the within action.

#### VIII.

As a further and separate defense, defendant alleges that it established its maximum prices pursuant to the first



and second formulas of Maximum Price Regulation #221 in good faith, and that said action is barred by Sec. 205 (d) of the Emergency Price Control Act of 1942 as amended, which provides that no person shall be liable for damages or penalties in any Federal, State, or Territorial Court, on any grounds for or in respect of anything done or [fol. 19] omitted to be done in good faith pursuant to any provision of the Act or under any regulation, order, price schedule, requirement, or agreement thereunder, or any price schedule of the Administrator of the Office of Price Administration or of the Administrator of the Office of Price Administration and Civilian Supply, notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or determined to be invalid.

Wherefore, defendant prays that the Court dismiss the within action and grant judgment in favor of the defendant.

Dated August 9, 1944.

F. H. STINCHFIELD,  
JOHN M. PALMER,  
STINCHFIELD, MACKALL,  
CROUNSE & MOORE,  
1100 First Nat. Bk.-Soo Line Bldg.

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[fol. 20] (Memorandum Relating to Exhibits A, B and C  
Attached to Answer.)

Exhibits A, B and C attached to the foregoing Answer are omitted from this printed record pursuant to Stipulation of Counsel. Such Exhibits however appear in the printed record in the case of Philip B. Fleming, Administrator, Office of Temporary Controls, Appellant, vs. Mun-singwear, Inc., No. 13,391, in the United States Circuit Court of Appeals for the Eighth Circuit, a copy of which printed record will be handed to the Court at the time of the submission of the instant cases, Nos. 13,875 and 13,876.

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Due and personal service of the within Answer is hereby admitted this 4th day of August, 1944.

R. M. McCAREINS and  
HYMEN L. GREENBERG,  
Attorneys for Chester Bowles,  
Admr., O. P. A.

Endorsed: Filed in U. S. District Court on August 18, 1944.

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[fol. 35] (Order of Pre-Trial Conference in Case No. 1147, Civil.)

This matter having come on to be heard at a pre-trial conference fixed by the Court on motion of the Defendant herein and the parties having appeared at such conference by their respective counsel and having agreed and stipulated to certain matters in connection with the trial of this case,

It Is Ordered, pursuant to the stipulation:

I.

The Court shall first determine the issues on Count I of the Complaint, which is the injunction count, and the second count of the complaint which is the treble damage [fol. 36] count, shall be held in abeyance until the injunction case has been determined.

II.

One of the major issues under the so-called first pricing formula of Section 1389.302 (A) of maximum price regulation No. 221 as amended is whether the orders for fall and winter underwear booked by defendant between February 2 to February 10, 1942, inclusive, were sales by written order for the fall and winter season of 1942. It is admitted that the defendant did book orders on or before February 10, 1942 for the style numbers of fall and winter underwear set forth in defendant's answer to plaintiff's interrogatory 2 a at the prices listed in the Men's and Boys', and Women's and Childrens' price lists bearing the words "Effective February 2, 1942," but plaintiff

denies that said orders so booked were for the fall and winter season of 1942.

### III.

The prices fixed in Defendant's price lists described in the preceding paragraph were based upon a level of costs determined as of January 1, 1942, but plaintiff claims that such fact is not material and has no bearing upon the issues of this case and reserves his right to object to the materiality and relevancy of such fact and any evidence thereof that may be offered upon the trial.

Defendant reserves the right to introduce further proof on its costs of raw material, labor, and production in January, 1942, as compared with the level of costs prevailing in 1941.

### IV.

Regarding the price lists marked "Effective February 2, 1942," Defendant's Vice-President, Mr. E. C. Wilson, gave directions to the order desk and other employees that beginning February 2, 1942, and until new prices were fixed, no more orders for fall and winter underwear should be accepted. He also directed Mr. C. C. Humphrey, sales manager, and Mr. Fred E. King, Controller, to compile new prices after investigation of costs. On February 5 or 6, 1942, pursuant to the direction given by Mr. Wilson, [fol. 37] drafts of price lists were prepared, and one draft was given to the order desk. Another draft was sent to the print shop with directions to print and mail out the same to the defendant's customers. Other copies were retained by Mr. Humphrey and Mr. Wilson and possibly by other employees. Pursuant to instructions from Mr. Wilson and on or about February 5 or 6, 1942, the order department immediately started booking orders which had accumulated from February 2 forward at the prices stated in the aforesaid draft of price lists, and the tabulation department was given the new prices to insert on their tabulation cards.

The records of the print shop show that the said drafts of price lists were received for printing and mailing on February 9, 1942, and the job completed on February 19, 1942. Any oral communication of the prices contained in said price lists by company officials and the sending of a

general letter to the trade advising of an impending price change are matters which will be left to be developed on the trial through oral and written testimony, and plaintiff reserves his right to object to the materiality and relevancy of any such matters.

#### V.

The price list marked "Effective February 9, 1942", covering five style numbers of fall and winter sleeping wear, was printed and mailed to Defendant's customers on February 6, 1942.

#### VI.

Defendant issued and distributed to its customers a price list for Women's and Girls' fall and winter underwear and sleeping wear marked, "Fall and Winter 1941-1942", and marked "Prices Effective July 1, 1941", which price list was printed and distributed to defendant's customers between July 29, 1941, and August 4, 1941. Defendant also issued a price list for Men's and Boys' underwear and sleeping wear marked, "Fall and Winter 1941-42" and marked "Prices Effective August 11, 1941", which price list was printed and distributed to defendant's customers between August 27, 1941, and August 29, 1941. Prior to the issuance and distribution of the two price lists last mentioned, defendant had issued mimeographed price lists in March, 1941, for fall and winter [fol. 38] underwear for the fall and winter season of 1941-1942, but such lists were never distributed to defendant's customers. Such lists were mailed or delivered to defendant's salesmen and no other distribution of them was made by defendant. No price lists for fall and winter underwear were issued in written or printed form by defendant to its customers for the fall and winter season of 1941-42, other than those above mentioned, until after August 29, 1941.

#### VII.

The Court may receive in evidence the Daily News Record for July 18, 1941, the International Textile Apparel Analysis issues commencing December 6, 1941 and ending March 21, 1942, the article appearing in the Federal Reserve Bulletin for July, 1942, relating to Department Store Inventories and other statistical data from other



Federal Reserve Bulletins and other sources, WPB Limitation Order L-63, and the statements appearing in the Yearbook of Retailing, 1942, made by Mr. Joseph L. Weiner and others there present relating to increases in inventories made by retail stores during the first half of the year 1942 and the article appearing in "Business and Finance" section of the January 8, 1945, issue of Time Magazine, subject only to Plaintiff's objection that all such evidence is immaterial and irrelevant.

### VIII.

The charts which have been prepared and which will be prepared by Defendant from its records may be offered and received in evidence without objection as to foundation, but Plaintiff reserves the right to object to the relevancy and materiality of the charts when offered.

### IX.

The charts which have been prepared and which will be prepared from the statistical data in Federal Reserve Bulletins and other sources may be offered and received in evidence without objection as to foundation, but Plaintiff reserves the right to object to the relevancy and materiality of the charts when offered.

The list of 34 names of retail stores which has this day been delivered to Plaintiff's counsel by Defendant's [fol. 39] counsel comprises a list of stores which subscribed to the International Textile Apparel Analysis in December, 1941, and in January, February, and March, 1942, said International Textile Apparel Analysis being a publication of A. W. Zelomek, and published and subscribed to as an economic advisory service. The list delivered to Plaintiff's counsel is entitled "List of Subscribers to 'International Textile Apparel Analysis' (Zelomek Service), "beginning with the name "Lord and Taylor, New York City," and ending with the name "Miller Brothers, Washington and Oregon." The list may be offered and received in evidence without objection as to foundation, but Plaintiff reserves the right to object to the materiality and relevancy when offered.

## XI.

Defendant's daily net sales and gross orders records for any month in the year 1939 to 1942, inclusive, may be offered and received in evidence without objection as to foundation, but Plaintiff reserves the right to object to their materiality and relevancy when offered.

## XII.

Defendant's Budget Control records for any months in the years 1939 to 1942, inclusive, may be offered and received in evidence without objection as to their foundation, but Plaintiff reserves the right to object to their materiality and relevancy. A tabulation of the information contained in said Budget Control records covering said periods may also be offered and received in evidence upon the same terms and conditions.

## XIII.

Defendant's cost records covering the costs of yarns, materials, and labor entering into the manufacture of fall and winter underwear during the year 1941 and January and February, 1942, may be offered and received in evidence without objection as to foundation, but Plaintiff reserves the right to object to the materiality and relevancy thereof. Defendant's records pertaining to market prices of yarn during the same period may be offered and received in evidence upon the same terms and conditions. Tabulations of the above cost and market data may be [fol. 40] offered and received in evidence upon the same terms and conditions.

## XIV.

Defendant's labor contract with the Textile Workers Union of America, effective September 25, 1941, containing a so-called escalator clause in which the Company agrees to increase the basic wage rates provided in the agreement by the amount of each five per cent increase in the cost of living index for the City of Minneapolis as reported by the Department of Labor, and the amendments thereto providing for an increase in basic wages with each three per cent increase in cost of living and records showing wage increases pursuant thereto may be offered and received in evidence without objection as to foundation,

Plaintiff reserving, however, the right to object to the relevancy and materiality of this evidence when offered.

### XV.

A tabulation of Defendant's contracts with the Armed Forces commencing in the year 1940 and extending through 1942 together with a tabulation of its delivery requirements and shipments under such contracts may be offered and received in evidence without objection as to foundation, but Plaintiff reserves the right to object to the materiality and relevancy of such evidence.

### XVI.

Newspaper articles, trade papers, and other communications to the public and the textile industry informing the industry and the public of changes which had taken place and which would take place in our national economy as a result of the declaration of war on December 8, 1941, and December 11, 1941, such as shortages of material, labor, and civilian goods, transportation shortages, and rising prices, said articles and publications commencing December 1, 1941, and ending April 30, 1942, may be offered and received in evidence without objection as to foundation or to the hearsay character of such evidence, but Plaintiff reserves the right to object to the materiality and relevancy of such evidence when offered.

[fol. 41]

### XVII.

The defendant corporation had approximately 6500 customers in the years 1941 and 1942 and received in the course of each year over one million separate orders. To avoid the necessity of analyzing and tabulating all orders booked by defendant during the periods February 2 to February 10, 1942 inclusive, April 1 to September 30, 1941 inclusive, and April 1 to September 30, 1942 inclusive, Plaintiff selected for examination and tabulation all of the orders contained in 20 customer accounts for said periods, copies of said orders being furnished to plaintiff in answer to Plaintiff's interrogatories 2c and 3. The Defendant has also selected for examination and tabulation all of the orders contained in 20 other customer accounts during the periods January 1, 1941 to December 31, 1941 inclusive and January 1, 1942 to September 30,



1942, inclusive. The orders contained in the 20 accounts selected by Plaintiff are representative of the orders contained in all of the defendant's accounts during the three periods covered in Plaintiff's selection, the orders contained in the 20 accounts selected by Defendant are representative of the orders contained in all of the Defendant's accounts during the periods covered in Defendant's selection. The individual orders or copies thereof and the tabulations and analyses prepared therefrom by Plaintiff and by Defendant may be offered and received in evidence. However, both parties reserve the right to question the weight and value of the evidence so received.

### XVIII.

The sales bulletins, trade letters, and price lists furnished to Plaintiff by Defendant in response to the discovery motion under Rule 34 of the Federal Rules of Civil Procedure may be offered and received in evidence without objection as to foundation, but Defendant reserves the right to object to the materiality and relevancy when offered. Likewise, sales bulletins, trade letters, and price lists which Defendant may wish to offer at the time of the trial may be received in evidence without objection as to [fol. 42] foundation, but Plaintiff reserves the right to object to the materiality and relevancy thereof when offered.

Entered February 20th, 1945.

MATTHEW M. JOYCE,  
U. S. District Judge.

Endorsed: Filed in U. S. District Court on February 20, 1945.

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[fol. 43] (Excerpt from Statement, Brief and Argument of Plaintiff in Case No. 1147, Civil.)

Statement, Brief and Argument of Plaintiff in Case No. 1147, in the District Court, filed on about June 26, 1945 in said cause, contains the following in the concluding paragraph:

"This case, as previously stated, is being tried on the injunction count. It is not a case for any consideration of

usual equitable issues presented in injunction cases. Normally, the Court exercises his discretion as to whether an injunction should issue under the doctrine of *The Hecht Co. vs. Bowles*, 321 U. S. 321. Here, however, the parties are at odds on a question of law, and the injunction is sought to settle that issue."

Endorsed: Filed in U. S. District Court on November 20, 1948.

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[fol. 83] (Opinion of District Court in Case No. 1147. Civil.)

This is a suit by the Price Administrator against an underwear manufacturer for the sale of fall and winter underwear claiming violation of Revised Price Regulation No. 221, particularly sections 1389.302 and 1389.303. An injunction and treble damages are asked, but by agreement the question of damages is to be held in abeyance pending the determination of the injunction issue. There is little or no dispute as to the facts. The price at which defendant sold underwear in question is conceded. Nor is there any question raised as to defendant's good faith. The only issue is whether defendant used the correct pricing formula in determining its ceiling prices.

To obtain the proper perspective I believe it advisable to consider the pertinent events in a somewhat chronological order. After the outbreak of World War II in December, 1941 it was obvious that our national economy would be subject to severe strains and marked changes. The needs and demands of the military would have to take precedence and civilian economy would suffer. Material shortages, increased labor costs, and higher prices were [fol. 84] predicted in all civilian consumer goods including the textile industry. The court can practically take judicial notice of this situation although the defendant offered proof thereof in the way of excerpts from trade and other contemporaneous publications.

The defendant is a large manufacturer of all types of underwear garments and enjoys a nation-wide trade. It is a "retailer" mill; that is, its customers sell directly to the consumer as distinguished from a "jobber" mill which

sells to wholesalers. Starting in January, 1942, defendant began to receive orders for fall and winter underwear in larger quantities than in any comparable period. Retail stores were ordering many times the number of dozens of fall and winter underwear they had ordered in any previous January. The situation was such that defendant's own inventory was imperiled. These developments were matters of concern to defendant's management and it was decided that in view of this volume of business prices must increase to reflect the then current costs. It is to be kept in mind that at the time there were no price regulations of any kind and that the war had commenced less than two months before. The Emergency Price Control Act became effective January 30, 1942. On February 2, 1942, defendant's new prices became effective. The method by which this change became effective becomes significant in view of the subsequent regulations issued pursuant to the Emergency Price Control Act. Defendant stopped filling new orders as of February 2nd and until February 6th was engaged in preparing the new prices on its entire line. These price changes were made effective as of February 2nd and so all accumulated orders and orders subsequent to February 6th were booked at the new prices. This policy was communicated to some customers by letters, to others by word of mouth. The complete new price list was sent to the printers on February 9th where it was printed and mailed to all of defendant's customers. This job was completed on February 19th but there was no way of ascertaining how many lists were printed and mailed on any given date.

On April 28, 1942, the general maximum price regulation became effective. This was the general "freeze" regulation [fol. 85] which fixed ceiling prices on all commodities at the March 1, 1942 levels. This was the first regulation to affect the defendant and of course defendant's ceiling price became the prices that were fixed in February as they were still in effect on March 1st. It was therefore unnecessary for defendant to make any price adjustment to conform to the regulation.

On September 15, 1942, Maximum Price Regulation No. 221 establishing ceiling prices for fall and winter under-

wear was issued to become effective September 21st. In brief, this regulation established four pricing rules or formulae. The first provided that the maximum price would be the highest price at which the manufacturer sold the garment by ~~written order or contract~~ after November 30, 1941 and before February 10, 1942. If the manufacturer could not price under this formula, he could use the price at which the garment was first offered for sale in a written or printed price list which was distributed generally to customers on or before February 10, 1942. If the manufacturer could not use either of these formulae he could add five per cent to his 1941 prices; and if none of these methods was available to him he could apply to the Administrator for an "in line" price. These last two methods are of little concern here as it is conceded that defendant made no attempt to apply them.

Under this original regulation it seems clear that [defendant] was not required to adjust its prices on any items on which it took orders at the new prices on or before February 10, 1942, as such prices would be the ceilings as fixed by formula (1) of Section 1389.302 (a) referred to above. There is no serious dispute on this question. However, on November 18, 1942, this part of Maximum Price Regulation No. 221 was amended to read:

"The manufacturer's maximum price shall be the highest price at which the manufacturer sold by written order or contract for the fall and winter season of 1942, the same garment of fall and winter knitted underwear after November 30, 1941 and before February 10, 1942;"

The underlined phrase constituted the amendment.° It is the meaning of this regulation as amended that is the major issue in this case. The Office of Price Administration takes [fol. 86] the position that the addition of the words "for the fall and winter season of 1942" disqualifies defendant from using its February, 1942 prices. In support of this contention it is argued that the statement of considerations accompanying the original MPR 221 shows an administrative intent to have jobber mills price under paragraphs 1 and 2 and retailer mills under paragraph 3; that the omission of the words "for the fall and winter season of 1942" was an oversight as testified to on the trial by an OPA attor-

ney who helped draft the regulation; that the only factor to consider in determining whether a sale was for the fall and winter season is the manufacturer's intent, and it is claimed that defendant intended the February, 1942 prices to be for "fill-in" orders only and was not an "opening of the fall line". I do not consider any of these contentions to be sound.

Regardless of what was said in the statement of considerations which accompanied the original regulations, the regulation itself is so clear as to need no construction. Any manufacturer who sold any garment during the base period could fix his ceiling price thereby. There were no qualifications in the regulation about jobber or retailer mills or for what reason the sale was made. The regulation itself defines the term "manufacturer" without reference to jobber or retailer mills. However, even the official press release which accompanied the issuance of the original MPR 221 uses such qualifying language that no one could conclude from it that hard and fast rules were being laid down by which the jobber mills were to use one pricing formula and retailer mills another. This press release reads in part:

"For the most part, the first and second methods of determining maximum prices are expected to be used by so-called 'jobber' mills, who customarily offer fall seasonal underwear during December and January for delivery during the following July through December. These mills usually supply wholesalers or jobbers as well as bulk buyers, such as mail order houses and the chain store trade.

"The third method will generally apply to 'retailer' mills which sell directly to retail, department and specialty stores. These manufacturers customarily do not circulate [fol. 87] price lists as early in the season as January." Underlining supplied).

The implication from the original regulation, the statement & considerations which accompanied it and this press release, is that if a retailer manufacturer could qualify under either formula 1 or 2, he could price thereunder. The OPA attempts to connect the original statement of considerations with the subsequent amendment of November 18th through the testimony of an attorney who assisted in draft-



ing both the original regulation and the amendment. In effect he testified that the words "for the fall and winter season of 1942" were omitted from Section 1389.302 (a) (1) through an oversight and therefore the original statement of considerations should be read in connection with the regulation as amended.

I am disturbed by the [though] that it is apparently seriously urged that the court should give weight to this testimony. That the public or the courts should be in any way bound by what was in the mind of a Government attorney when he drafted the regulation some three years before the trial, seems to be a dangerous doctrine. Particularly is this so when he testifies that the regulation was intended to say something that it specifically did not say; and when his explanation of the purpose of the amendment is at complete variance with the statement of considerations issued by the OPA at the time of the amendment. The statute requires that every regulation be accompanied by such a statement. 50 U.S.C.A. App. Sec. 902 (a). Insofar as it pertains to the addition of the words "for the fall and winter season of 1942" that statement reads:

"Under the Regulation ceiling prices for manufacturers are established at the prices at which written orders were booked during the period from December 10, 1941 to February 10, 1942. It appears that the only orders accepted by certain manufacturers for certain of the garments covered by the Regulation were 'fill-in' orders based on the level of costs and prices for the 1941 season. In order to correct this situation, sub-paragraphs (1) and (2) of Section 1389.302 (a) are amended so as to make it clear that manufacturers are to establish their maximum prices on the basis only of written orders or contracts booked during the specified base period for the 1942 fall and winter season."

[fol. 88] Nothing is here said of any oversight and the explanation is clear and logical. Some manufacturers had apparently made scattered sales during the base period of certain items for the 1941 season and the prices based on the 1941 costs. Without the amendment those sales would govern future ceiling which would be a hardship on these manufacturers. With the amendment they would not be bound by these prices and, I presume upon a showing that

the sales were not for the 1942 season would be permitted to use one of the other pricing formulae. This condition did not affect defendant as it was pricing under its February prices which had been adjusted to reflect 1942 costs.

The only remaining question under formula (1) is whether these prices were on garments "for the fall and winter season of 1942". The Regulation does not contain a definition of this term nor does such definition seem necessary. The ordinary meaning of "garments for the fall and winter season of 1942" would, it seems to me, be garments that were to be used or worn in the fall and winter of that year. Whether a garment were in that category or not would seem to be a simple question of fact. That is the position taken by the OPA as late as July 24, 1944, when a Mr. Emerson, the Deputy Administrator for Enforcement in Washington, in writing to defendant's President said:

"We are, of course, interested in seeing and considering any evidence which indicates that orders taken by Munsingwear between February 2 and 10 were for the 1942 fall and winter season. It seems to me, however, that the showing you have made is not an indication of such a fact. Thus the increase in sales volume is entirely compatible with the increase in consumer demand during the 1941 season. Furthermore, even if it were established that retailers were doing advance buying in the early months of 1942, it would still hold true that fill-in orders for the 1941 season were also being received during that period. The first pricing method of MPB 221 would, then, not be available for those style numbers for which only fill-in orders were received in the base period. In addition, the prices being charged by the Company would be correct only as to those style numbers for which advance buying orders, as contrasted with fill-in orders, were received between February 2 and 10.

[fol. 89] "Evidence which would have a bearing on the nature of the orders taken between February 2 and 10, 1942, would include a statistical comparison between the size and range of those orders and the size and range of orders taken in the springs and summers of 1941 and 1942 and in the opening calendar months of 1940 and 1941. Wherever possible a comparison should be made between the orders taken from the same customers in these different periods. If you

care to submit any such evidence, we will be glad to review it and discuss it with you."

The tenor of this letter is that defendant's proof was not sufficient and suggesting what kind of proof to produce. Upon the trial OPA took an entirely different and inconsistent position. It was urged that only the manufacturer's intent should be considered and that evidence to show facts was immaterial. I cannot agree with this latter position of OPA and I construe the regulation to mean that the prices which govern a particular manufacturer are those at which he sold or booked orders for garments during the base period, which garments were for use or consumption in the fall and winter of 1942.

Defendant introduced a wealth of documentary evidence which stands practically uncontradicted in this record. The form of proof follows the suggestions set forth in Mr. Emerson's letter. Statistical comparisons are made between orders received by defendant for fall and winter underwear in the early months of 1942 and the similar period in 1941 and prior years. This is broken down as to number of dozens and dollar value. Comparison is also made as to accounts of certain of defendant's customers selected by both parties. Comparison is made between defendant's 1942 first quarter increase in sales and the national increase in retail sales for the same period. This is broken down into specific weeks. Increase in department store inventories is compared with increase in sales, which is broken down as to kinds of consumer goods and by size of store. It would be impractical and is unnecessary to summarize all of these statistics. Suffice it to say that the weight of the evidence shows that during January, February and March of 1942 defendant received orders for fall and winter underwear in vastly greater quantities than in any prior year, that specified customers of defendant materially increased their or-[fol. 90] ders for this type of merchandise over any prior comparable period, that defendant's increase in sales was greater than the national increase for the same period, that the inventories for retail stores increased all out of proportion to their sales increase in the same period. From these facts the conclusion seems obvious that prior to February 10, 1942, defendant was selling and booking orders for fall and winter underwear which was for sale to the ultimate

consumer for the fall and winter season of 1942 and not for immediate sale or use in the 1941 season. Defendant was therefore justified in fixing its ceiling prices in accordance with paragraph 1 of Section 1389.302 (a) of Revised Maximum Price Regulation 221 on the 127 items or styles for which it booked orders prior to February 10, 1942.

There were some sixteen items for which defendant booked no orders before February 10th and on these it seeks to justify its prices under formula 2 of Section 1389.302 (a), which authorizes as the ceiling a price " \* \* \* at which the same garment was first offered in the manufacturer's written or printed list for the fall and winter season of 1942, which was distributed generally to the customers or prospective customers of the manufacturer on or before February 10, 1942." As above explained, I considered defendant's February 2, 1942 prices, as contained in these price lists, to be in fact for the fall and winter season of 1942. The only question is the effect of the language "distributed generally \* \* \* on or before February 10, 1942". These lists were effective February 2nd, the process of printing and distribution was commenced February 9th and concluded February 19th. This was probably not a literal compliance with the regulation. However, in construing the regulation with relation to these facts, all factors must be considered. This entire regulation (MPR 221) is aimed at fixing each manufacturer's ceiling prices in accordance with his own experience and conduct during the base period. There is no connection or relation between manufacturers that affects prices. Thus two manufacturers making identical products may find themselves bound by different maximum prices. The whole purpose of the regulation is to judge the manufacturer's conduct during the base period. In this case the lists were in effect, were being used, and [fol. 91] were partially distributed by February 10th. There can be no dispute but that the defendant was binding itself to these prices at that time and was doing so in the ordinary course of its business. If orders on these particular items had come in by February 10th they would obviously have been ~~booked~~ at the listed prices as were all other orders received. In such case, the prices would be justified under the first pricing formula. It is clear that these lists fulfill the intent and purpose of the regulation



and I believe under all the facts were in substantial compliance therewith.

For the reasons expressed in this Memorandum I conclude the defendant was not in violation of Revised Maximum Price Regulation 221 and that plaintiff's case should be dismissed. Defendant will submit findings of fact and conclusions of law in accordance with the views herein expressed. Plaintiff is allowed an exception.

MATTHEW M. JOYCE,  
United States District Judge.

Dated October 22, 1945.

Endorsed: Filed in U. S. District Court on October 22, 1945.

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(Findings of Fact, Conclusions of Law and Order for Judgment in Case No. 1147, Civil.)

In the District Court of the United States for the District of Minnesota, Fourth Division.

Chester Bowles, Administrator, Office of Price Administration, Plaintiff,

No. 1147. vs. Civil Action.

Munsingwear, Inc., a corporation, Defendant.

The above entitled action being on the General Term Calendar of the Court, came duly on for trial before the undersigned, in the Federal Building in Minneapolis, Minnesota, in the Fourth Division of said District, on May 10, 1945. The action is an injunction and treble damage suit under Section 205 (a) and 205 (c) of the Emergency Price Control Act of 1942, as amended. The matter was heard by the Court without a jury. Mr. Harry C. Witherell and [fol. 92] Mrs. Catherine Johnson of the Regional Office of the Office of Price Administration in Chicago, Illinois, and Mr. H. L. Greenberg of the District Office of the Office of Price Administration in St. Paul, Minnesota appeared on behalf of plaintiff. Messrs. F. H. Stinchfield and John M. Palmer of the firm of Stinchfield, Mackall, Crounse & Moore of Minneapolis, Minnesota, appeared on behalf of defendant. Upon the pleadings, the pre-trial stipulation and order, the evidence received at the trial, and all the



records, files and proceedings in the case, the Court makes the following as its

## Findings of Fact.

### I.

Plaintiff is, and was at all times herein material, the duly appointed, qualified and acting Administrator of the Office of Price Administration, under the Emergency Price Control Act of 1942, ~~as~~ amended.

### II.

The defendant is, and was at all times herein material, a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, with its office and principal place of business in City of Minneapolis, County of Hennepin and State of Minnesota, within the jurisdiction of this Court.

### III.

Defendant is, and was at all times herein material, engaged in the business of manufacturing and selling foundation garments for women and girls, hosiery for men, women and children and underwear and sleepingwear for women and girls and for men and boys. As part of its underwear business, it manufactures and sells a line of garments known as fall and winter knitted underwear and sleepingwear of the type defined and described in Maximum Price Regulation No. 221, Section 1389.314, Appendix A thereof. (Both underwear and sleepingwear of the type covered by the regulation are referred to hereinafter as fall and winter underwear.) Defendant's line of fall and winter underwear is, and was at all times herein material, made up of approximately 151 separate garment items, known and [fol. 93] described as style numbers or stock numbers. In dispute are 145 stock numbers.

### IV.

Defendant at all times material offered for sale and sold its underwear garments directly to retail stores which sold directly to consumers.

## V.

On September 15, 1942, the Administrator of the Office of Price Administration issued Maximum Price Regulation No. 221 covering fall and winter underwear of the type in dispute. On November 18, 1942, he issued Amendment No. 1 to said regulation, and, after the amendment, the first two pricing formulae contained in Section 1389.302 (a) (1) and (a) (2) of the regulation read as follows:

“(1) The manufacturer’s maximum price shall be the highest price at which the manufacturer sold by written order or contract for the fall and winter season of 1942, the same garment of fall and winter knitted underwear after November 30, 1941, and before February 10, 1942; or

“(2) If the manufacturer did not sell by written order or contract for the fall and winter season of 1942, after November 30, 1941 and before February 10, 1942, the same garment of fall and winter knitted underwear, the maximum price for such garment shall be the price at which the same garment was first offered in the manufacturer’s written or printed price list for the fall and winter season of 1942 which was distributed generally to the customers or prospective customers of the manufacturer on or before February 10, 1942. \* \* \*.”

## VI.

On, and before February 10, 1942 and during the period from February 2, 1942 to February 10, 1942, defendant sold by written order 127 of its stock numbers of fall and winter underwear in dispute at prices listed in two price lists effective February 2, 1942, said lists being identified and received in evidence as plaintiff’s Exhibits I and J, excepting only three stock numbers, the prices of which were listed in a price list effective February 9, 1942 and identified and received in evidence as defendant’s Exhibit No. [fol. 94] 11, as hereinafter set forth in Findings of Fact numbered X. Said 127 stock numbers are listed in defendant’s answer to plaintiff’s Interrogatory 2 (a) of the Answers to Interrogatories filed in the case on about December 21, 1944 and offered and received in evidence at the trial.

## VII.

The prices contained in the said lists and the prices at which defendant sold from February 2 to 10, 1942 were the highest prices at which defendant sold said 127 stock numbers of fall and winter underwear during the base period of November 30, 1941 to February 10, 1942, set out in the first pricing formulae of said Section 1389.302 (a) (1) of Maximum Price Regulation No. 221, as amended. At no time after February 10, 1942 has defendant sold its garments of fall and winter underwear at prices in excess of those listed in the said price lists. In some instances throughout the period, June 9, 1943 to June 9, 1944, the defendant did sell at prices listed in said price lists.

## VIII.

The said 127 stock numbers of fall and winter underwear garments were sold by defendant upon written order or contract during said base period from November 30, 1941 to February 10, 1942 at the prices contained in said price lists. The said 127 stock numbers of fall and winter underwear garments were sold by defendant to its retail store customers for resale in the fall and winter season of 1942 and said garments were for use and consumption in the fall and winter season of 1942.

## IX.

Defendant first offered 16 stock numbers, in addition to the 127 stock numbers hereinbefore referred to, of its fall and winter underwear in said written and printed price lists effective February 2, 1942 and identified as plaintiff's Exhibits I and J. The 16 stock numbers are listed in the defendant's answer to plaintiff's Interrogatory 4 (a) of the Answers to Interrogatories filed in the case on about December 21, 1944 and received in evidence upon the trial. Defendant made no sales and booked no orders for said 16 stock numbers in the period from February 2, 1942 to [fol. 95] February 10, 1942, and there is no evidence that any sales were made by written orders received for any of said stock numbers during the base period from November 30, 1941 to February 10, 1942. The said price lists effective February 2, 1942, and the prices therein enumerated, covered its line of fall and winter underwear garments

which defendant offered to sell and its retail store customers purchased to sell in the fall and winter season of 1942 and which were for use and consumption in the fall and winter season of 1942. On and before February 10, 1942, defendant gave out the new prices on the garments contained in the said price lists effective February 2, 1942 to customers orally, personally and by telephone. Defendant commenced the job of both printing and mailing to its customers not later than February 9, 1942, and it made a general distribution to customers or prospective customers on or before February 10, 1942 within the meaning of Section 1389.302 (a) (2) of Maximum Price Regulation No. 221, as amended. At no time since February 10, 1942 has defendant sold the said 16 stock numbers of fall and winter underwear at prices in excess of those contained in said price lists.

## X.

On February 6, 1942, defendant printed and mailed to its customers a price list marked effective February 9, 1942, said list being offered and received in evidence as defendant's Exhibit No. 11. This list contains five stock numbers of fall and winter sleepingwear known as men's and boy's balbriggan pajamas and commodities of the type covered by Maximum Price Regulation No. 221 as amended; the said five stock items are numbered in the list as follows: 672-889 Reg., 672-889-6 footer, 672-892 Reg., 672-897 Reg., and 551-888 Reg. The stock items numbered 672-889, 672-892, and 672-897 were sold upon written orders booked by defendant within the period from February 2 to 10, 1942 and at the prices listed in defendant's Exhibit No. 11, and these items were included in the 127 stock numbers of fall and winter underwear garments listed in defendant's answer to plaintiff's Interrogatory 2 (a). The facts respecting the sales of these three stock numbers are as the court has found in the above Findings of Fact numbered VI, VII, and VIII, and the defendant's ceiling prices for [fol. 96] these three items were established, as in the matter of the 127 stock numbers, under the first pricing formula in Section 1389.302 (a) (1) of Maximum Price Regulation No. 221 as amended. The stock numbers 672-899-6 footer and 551-888 were first offered for sale by price list in defendant's Exhibit No. 11. Defendant made no sales



and booked no orders for the said two stock numbers in the period from February 2 to February 10, 1942 and there is no evidence that any sales were made of these numbers by written orders received during the base period from November 30, 1941 to February 10, 1942. The price list identified as defendant's Exhibit No. 11 covered said five fall and winter garments which defendant offered to sell and its retail store customers purchased to sell in the fall and winter season of 1942 and which were for use and consumption in that season. The defendant printed and mailed the list identified as defendant's Exhibit No. 11 to its customers or prospective customers on February 6, 1942, and it made a general distribution of the said written and printed lists on and before February 10, 1942, within the meaning of Section 1389.302 (a) (2) of Maximum Price Regulation No. 221 as amended. At no time since February 10, 1942 has defendant sold the said five stock numbers of fall and winter underwear at prices in excess of those contained in the said price list.

#### Conclusions Of Law.

1. The orders booked on the 127 stock numbers of fall and winter underwear garments set forth in defendant's answer to plaintiff's interrogatory 2 (a) were sales by written order for the fall and winter season of 1942. The prices at which defendant sold said stock numbers between February 2, 1942 and February 10, 1942 were the highest prices at which defendant sold during the base period of November 30, 1941 to February 10, 1942. Defendant correctly established its ceiling prices on said 127 of its stock numbers of fall and winter underwear under and within the meaning of Section 1389.302 (a) (1) of Maximum Price Regulation No. 221 as amended.

2. The price lists, identified as plaintiff's Exhibits I and J, and defendant's Exhibit No. 11, and the fall and winter underwear garments offered at the prices therein [fol. 97] contained were for the fall and winter season of 1942, and said lists and the garment prices therein contained were distributed generally to defendant's customers or prospective customers on or before February 10, 1942 within the meaning of Section 1389.302 (a) (2) of Maximum Price Regulation No. 221 as amended. Defend-



ant correctly established its ceiling prices on the 16 stock numbers set forth in defendant's answer to plaintiff's Interrogatory 4 (a) under and within the meaning of said Section 1389.302 (a) (2) of Maximum Price Regulation No. 221 as amended, and defendant correctly established its ceiling prices on the said two stock numbers covered in the price list, defendant's Exhibit No. 11, under the same Section of said regulation.

3. Defendant at all times complied in all material respects with MPR 221 as amended, and it is not and has not been in violation thereof.

4. This Court has, and at all times herein material, has had jurisdiction of the parties and subject matter.

Therefore, It Is Ordered, That plaintiff's case be dismissed. Plaintiff is allowed an exception.

The Court's memorandum, dated and filed October 22, 1942, is made a part of these Findings of Fact and Conclusions of Law.

Let judgment be entered accordingly.

MATTHEW M. JOYCE,  
Judge of the U. S. District Court.

Endorsed: Filed in U. S. District Court on January 19, 1946.

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Now, therefore, by reason of the premises aforesaid, it is Considered, Ordered And Adjudged: that the above [entitled] cause be and the same is hereby dismissed.

Further Ordered: that all further proceedings herein, except the taxation of costs and entry of judgment therefor, be and they are hereby stayed for a period of ten (10) [fol. 98] days from and after this date for such further action as this plaintiff may be advised to take under the provisions of Supreme Court Rules 59 and 62 governing Civil Procedure.

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[fol. 99] (Memorandum Relating to Mandate of United States Circuit Court of Appeals in Case No. 13,391.)

The Mandate of the United States Circuit Court of Appeals for the Eighth Circuit in the case of Philip B. Fleming, Administrator Office of Temporary Controls, Appellant, vs. Munsingwear, Inc., No. 13,391, was issued on July 9, 1947.

The following is a copy of the Judgment of the United States Circuit Court of Appeals which was included in the foregoing mandate:

[fol. 100] (Judgment.)

United States Circuit Court of Appeals,  
Eighth Circuit.

May Term, 1947.

Thursday, June 19, 1947.

Philip B. Fleming, Administrator, Office of Temporary  
Controls, Appellant,  
No. 13,391. vs.  
Munsingwear, Inc., a corporation.

Appeal from the District Court of the United States  
for the District of Minnesota.

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, on the motion of appellee to dismiss the appeal or to affirm the judgment and on the motion of appellee to dismiss the appeal on the ground that the case is moot, and was argued by counsel.

On Consideration Whereof, and it appearing that the case has become moot, It is now here Ordered and Adjudged by this Court that the appeal from the said District Court in this cause be, and the same is hereby, dismissed.

June 19, 1947.

[fol. 101] (Memorandum relating to printed record in the case of Philip B. Fleming, Administrator, Office of Temporary Controls, Appellant, vs. Munsingwear, Inc., No. 13,391, in United States Circuit Court of Appeals for the Eighth Circuit.)

The printed record consisting of two volumes in the case of Philip B. Fleming, Administrator, Office of Temporary Controls, Appellant, vs. Munsingwear, Inc., No. 13,391, in the United States Circuit Court of Appeals for the Eighth Circuit, was called for by the Designations of the Defendant, but such printed record in Case No. 13,391 has not been reprinted in the Record in these appeals, Nos. 13,875 and 13,876, but is included herein by reference.

Copies of the printed record in Case No. 13,391 will be available and handed to the Court at the time of the submission of these appeals, Nos. 13,875 and 13,876.

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[fol. 102] Complaint in Case No. 1463, Civil.)

In the District Court of the United States for the District of Minnesota, Fourth Division.

Chester Bowles, Administrator, Office of Price  
Administration, Plaintiff,

No. 1463 vs. Civil Action

Munsingwear, Inc., a corporation, Defendant.

1. Plaintiff, as Administrator of the Office of Price Administration, brings this action for treble damages on behalf of the United States, pursuant to the provisions of Section 205 of the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U.S.C.A. App. Sec. 901-946), as amended (56 Stat. 765, 50 U.S.C.A. App. Sec. 961-971; Stabilization Extension Act of 1944, Pub. Law No. 383, 78th Cong., 2d Sess.), said Act, as amended, being hereinafter called the Act.

2. Jurisdiction of this action is conferred upon this Court by Section 205 of the Act.

3. At all times hereinafter mentioned there has been in effect, pursuant to the Act, Maximum Price Regulation No. 221 (7 F.R. 7318), as amended, establishing maximum manufacturers' prices for fall and winter knitted underwear.

4. The defendant is a corporation incorporated under the laws of the State of Delaware and has its principal place of business at 718 Glenwood Avenue in the City of Minneapolis, County of Hennepin, and State of Minnesota, within the jurisdiction of this Court. At all times herein mentioned the defendant has been engaged, and is now engaged, in the manufacture of underwear in the City of Minneapolis and in the sale of said underwear in this district and elsewhere.

5. During the period June 9, 1944 to and including June 6, 1945, the defendant has sold and delivered fall and winter knitted underwear at prices in excess of the maximum prices properly established therefor pursuant [fol. 103] to the provisions of said Maximum Price Regulation No. 221, as amended; defendant demanded and received a price or consideration for said fall and winter knitted underwear in excess of the applicable maximum price therefor.

6. All of the defendant's said sales and deliveries of fall and winter knitted underwear were made to dealers who purchased in the course of trade and business for the purpose of resale.

Wherefore, plaintiff demands judgment for and on behalf of the United States against the defendant for three times the aggregate amount by which the price or consideration demanded and received by the defendant for the fall and winter knitted underwear so sold as aforesaid exceeded the applicable maximum price established therefore by Maximum Price Regulation No. 221, as

amended, but not less than \$50.00 and costs, according to Section 205 of the Act. .

Dated: June 6, 1945. .

AMOS J. COFFMAN,  
Regional Attorney.

HARRIS J. NUERNBERG,  
District Enforcement Attorney.

HYMEN L. GREENBERG,  
Litigation Attorney.

c/o Twin Cities District Office,  
W-1200 First National Bank Bldg.,  
Saint Paul 1, Minnesota,  
Attorneys for Plaintiff.

Endorsed: Filed in U. S. District Court on June 8, 1945.

[fol. 104] (Memorandum relating to Motion of Defendant to dismiss together with Motion in Alternative to Compel Plaintiff to make Complaint more definite and certain in Case No. 1463, Civil.)

"The Notice of Motion was accompanied by a type-written motion of the defendant interposing the defense under Rule 12(b), subdivision 6, that the complaint fails to state a claim on which relief can be granted and a motion to dismiss on said ground, together with a motion in the alternative to compel the plaintiff to make his complaint more definite and certain, in the event that the motion to dismiss be denied."

[fol. 105] (Motion of Defendant to Dismiss in Cases Nos. 1147, Civil and 1463, Civil.)

Comes now the defendant and moves to dismiss the motion of petitioner, Philip B. Fleming, Administrator, Office of Temporary Controls, to be substituted as the party plaintiff in the name and stead of Paul A. Porter, Administrator, Office of Price Administrator, upon each of the grounds as follows, to-wit:



1. That the above action has abated by reason of the failure of plaintiff above named to secure his substitution in the place of Chester Bowles, Administrator, Office of Price Administrator, within the period and in accordance with requirements of Rule 25 (d) of the Federal Rules of Civil Procedure.

2. That petitioner, Philip B. Fleming, Administrator of the Office of Temporary Controls, cannot satisfactorily show to this Court that there is a substantial need for continuing and maintaining the above entitled action for the reason that the Office of Temporary Controls and all functions of the Office of Price Administration, including the function of maintaining civil actions, must be closed out and liquidated on or before June 30, 1947, by virtue of the Urgent Deficiency Appropriation Act, 1947, Act of March 22, 1947, Public Law 20, 80th Congress, 1st Session. The nature of the above action is such that it cannot be closed and liquidated on or prior to June 30, 1947.

[fol. 106] 3. That under Section 201 (b) of the Emergency Price Control Act, the president of the United States had no power, by virtue of Executive Order 9809, to transfer and invest all of the functions of the Administrator of the Office of Price Administration in the Administrator of the Office of Temporary Controls on December 12, 1946.

The foregoing motion will be based upon all the files, records and proceedings in the above entitled action, and in Civil Action No. 1147, and upon the affidavit of John M. Palmer, hereto attached and made a part hereof.

Dated: April 8, 1947.

F. H. STINCHFIELD,

JOHN M. PALMER,

STINCHFIELD MACKALL

CROUNSE & MOORE,

Attorneys for Defendant,

1100 First National-Soo Line Bldg.,  
Minneapolis, Minnesota.

Endorsed: Filed in U. S. District Court on April 9, 1947.

[fol. 107] (Notice of Motion of Defendant to Dismiss.)

To the Petitioner, Philip B. Fleming, Administrator, Office of Temporary Controls, and

To his attorneys, Isadore Kovitz, Regional Enforcement Attorney, James S. Erickson, Attorney in Charge, and Monroe Zalkind, Enforcement Attorney:

Please Take Notice That the defendant above named will bring the attached motion on for hearing before this court in its Court Room in the United States Court House in the City of Minneapolis, Minnesota, on the 14th day of April, 1947, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated, April 8, 1947.

F. H. STINCHFIELD,

JOHN M. PALMER,

STINCHFIELD MACKALL

CROUNSE & MOORE,

Attorneys for Defendant,

1100 First National-Soo Line Bldg.,  
Minneapolis, Minnesota.

[fol. 108] (Affidavit Of John M. Palmer In Support Of Motion To Dismiss).

State of Minnesota, County of Hennepin, ss.

JOHN M. PALMER, being first duly sworn, deposes and says:

That he is an attorney at law, who, at all times herein material, was admitted to the practice of his profession in the courts of the State of Minnesota and the Federal courts in this district.

That he has examined his file in reference to the above action and found that he received an application to substitute Paul A. Porter in the place of Chester Bowles Administrator, Office of Price Administration, entitled: in the matter of all actions pending in the United States District Court, District of Minnesota, Fourth Division, wherein Chester Bowles, Administrator, Office of Price Administra-

tion, is plaintiff. Said application is dated March 1, 1946, and is attached hereto, marked "Exhibit A" and made a part hereof.

That attached to the application is an order to substitute, also dated March 1, 1946. Affiant alleges that he received the application to substitute and the order based thereon some time after March 1, 1946, and that he did not receive a notice of the application prior to the substitution.

Affiant further states that the files and records in the office of the Clerk of this Court do not disclose proof of the [fol. 109] service of the application to substitute on the party defendant in this or any other action.

That affiant is informed and believes that said application was made ex parte and without notice to the parties defendant in these or other actions in which the Administrator of the Office of Price Administration appears as party plaintiff.

Further affiant saith not, except that this affidavit is made in support of its motion to dismiss the above action and to dismiss the motion of the petitioner, Philip B. Fleming, for substitution as party plaintiff in the place and stead of Paul A. Porter, Administrator, Office of Price Administration.

JOHN M. PALMER.

Subscribed and sworn to before me this 8th day of April, 1947.

ORPHA O. SINCOCK

Notary Public, Hennepin County,  
Minn.

(Notarial Seal)

My Commission Expires Sept. 10, 1952.

[fol. 110]

Exhibit "A"

In The Matter Of All Actions Pending In The United States District Court, District Of Minnesota, Fourth Division, Wherein Chester Bowles, Administrator, Office of Price Administration Is Plaintiff.

### Order To Substitute.

Upon the attached Application and the Court being duly advised in the premises, It Is Ordered:

That Paul A. Porter, as Administrator of the Office of Price Administration, be substituted as a party in the place and stead of Chester Bowles, in all actions now pending in the said District of Minnesota, Fourth Division.

Dated: March 1st, 1946.

GUNNAR H. NORDBYE  
United States District Judge.

[fol. 111] In the Matter Of All Actions Pending In The United States District Court, District Of Minnesota, Fourth Division Wherein Chester Bowles, Administrator, Office Of Price Administration, Is Plaintiff.

### Application To Substitute.

Paul A. Porter, by his counsel, respectfully informs the Court that Chester Bowles has resigned from the Office of Administrator of the Office of Price Administration. His resignation was duly accepted and, said Paul A. Porter, whose appointment by the President for the office of Administrator was confirmed by the United States Senate on February 21, 1946, entered upon his duties in said Office on February 26, 1946 and is now lawfully acting as Administrator of the Office of Price Administration. There is substantial need of continuing and maintaining all pending actions by him as successor in office to Chester Bowles as Administrator of the Office of Price Administration, for the reason that such actions relate to the present and future discharge of the Office of Administrator of the Office of Price Administration and is important in the administration and enforcement of the Emergency Price Control Act, as amended.

Wherefore, Paul A. Porter, as Administrator of the Office of Price Administration, moves for leave to be substituted as a party in the place and stead of Chester Bowles, under authority of Rule 25(D) of the Federal Rules of Civil Pro-

cedure, in all actions now pending in the said District of Minnesota, Fourth Division.

Dated March 1st, 1946.

AMOS J. COFFMAN  
Regional Enforcement Attorney.

HARRIS J. NUERNBERG  
District Enforcement Attorney.

LOWELL J. GRADY  
Litigation Attorney — Attorneys for  
Twin Cities District Office, Office of  
Price Administration, W-1200 First  
National Bank Building, Saint Paul 1  
Minnesota.

(Endorsed) Filed April 9th, 1947.

THOMAS H. HOWARD, Clerk.  
By Chell M. Smith, Chief Deputy.

[fol. 112] (Affidavit Of Service Of Notice And Motion  
Of Defendant To Dismiss).

State of Minnesota, County of Hennepin, ss.

John M. Palmer, being first duly sworn, deposes and  
says:

That he and F. H. Stinchfield of the firm of Stinchfield, Mackall, Crouse and Moore, are the attorneys for the defendant in the above entitled action: that they reside in the City of Minneapolis, County of Hennepin and State of Minnesota, and that the firm with which they are connected also is located in the same city, county and state. That the attorneys of record for the plaintiff and the petitioner in the above action reside and are located outside the City of Minneapolis, Hennepin County, Minnesota, and their address on their motion papers is given as: Office of Temporary Controls, Office of Price Administration, Saint Paul 1, Minnesota.

That affiant served a true and complete copy of defendant's notice of motion and motion to dismiss in said action



on the attorney of record who signed the motion papers for and on behalf of the plaintiff and the petitioner in said action, to-wit: Monroe Zalkind, who is located at the address for the attorneys of record for plaintiff and the petitioner above mentioned.

That said service was made on April 8, 1947, upon said attorney for the plaintiff and the petitioner, by placing a true and correct copy of defendant's attached notice of motion and motion dismiss in an envelope, addressed to said attorney for the plaintiff and the petitioner at the address shown upon the motion papers served and filed by [fol. 113] the plaintiff and the petitioner, which were served and filed on or about March 20, 1947 in said action, and by placing said envelope, sealed, with postage prepaid and return address affixed, in the regular course of mail at Minneapolis, Minnesota.

Further affiant saith not except that this affidavit is made as proof of service of defendant's notice of motion and motion to dismiss upon the attorney of record for the plaintiff and the petitioner.

JOHN M. PALMER.

Subscribed and sworn to before me this 8th day of April, 1947.

ORPHA O. SINCOCK

Notary Public, Hennepin County,  
Minnesota.

(Notarial Seal)

My commission expires September 10, 1952.

Endorsed: Filed in U. S. District Court on April 9, 1947.

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[fol. 114] (Order Of District Court Granting Motion Of Defendant To Dismiss In Cases Nos. 1147, Civil, and 1463, Civil).

This matter came on for hearing before the Court on May 7, 1948, at 2:00 p. m., at the U. S. Court House in Minneapolis, Minnesota, upon the motion of the defendant to dismiss the treble-damage action under Section 205(e) of the Emergency Price Control Act of 1942 making up count II of the complaint in case no. 1147 and to dismiss

case no. 1463, also a treble-damage action under the same Act involving the same parties, the same subject matter, and the same issues of law and fact, excepting only the period of alleged damages, as that involved in case no. 1147. Defendant's motion in each case is based upon the ground that case no. 1147 was made up of two causes of action, represented by separate counts in the complaint, count I being an injunction action under Section 205(a) of the Emergency Price Control Act of 1942, and Count II being a treble-damage action under Section 205(e) of the same Act; that both actions were made to depend upon the same issues of alleged violation of Maximum Price Regulation No. 221 as amended, issued pursuant to said Emergency Price Control Act; that in accordance with a pre-trial agreement, embodied in a pre-trial Order of this Court, count I was tried and the said issues of violation of Maximum Price Regulation No. 221 as amended were found and determined in defendant's favor; that final judgment on the merits dismissing said cause was entered on January 19, 1946 in this Court; and that said final judgment on the merits, not being modified in any respect, stands as an [fol. 115] estoppel under the law and doctrine of res judicata against the re-litigation of the same issues of violation as those determined by the judgment. Mr. John M. Palmer and Stinchfield, Mackall, Crounse & Moore, 1100 First National Soo Line Building, Minneapolis, Minnesota, appeared on behalf of the defendant in support of said motions. Mr. Victor E. Anderson, U. S. District Attorney, and Mr. John W. Graff, Assistant U. S. District Attorney, Federal Courts Building, St. Paul, Minnesota, appeared for the plaintiff in opposition thereto.

At the hearing on said motions, it was conceded by counsel for the plaintiff that a redetermination of the same issues of violation of Maximum Price Regulation No. 221 as amended, as those determined by the judgment in said injunction action would be an essential prerequisite to the recovery of any damages in the said pending treble-damage actions, and he also conceded that he would submit the issues of violation in the treble-damage actions on the same record and evidence as that taken, transcribed and printed in said injunction action. After hearing the arguments of counsel and upon all the files, records, stipulations, con-

cessions and proceedings herein pertaining to the above entitled cases no. 1147 and 1463.

It Is Hereby Ordered That the motions of the defendant, and each of them, be and hereby are granted.

The Clerk of this Court is directed to enter a judgement of dismissal in the treble-damage action making up count II of the complaint in case no. 1147 and a judgment of dismissal in case no. 1463.

An exception is reserved to the plaintiff.

Dated at Minneapolis, Minnesota, 2nd day of June, 1948.

**MATTHEW M. JOYCE**  
United States District Judge.

Endorsed: Filed in U. S. District Court on June 2, 1948.

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[fol. 116] (Judgment in Case No. 1147, Civil,  
June 2, 1948.)

In the District Court of the United States in and for  
the District of Minnesota, Fourth Division.

Term Minutes.

June 2, 1948.

March Term, A. D. 1948.

Tuesday morning.

Court opened pursuant to adjournment.

Present: Honorable MATTHEW M. JOYCE, Judge  
Honorable GUNNAR H. NORDBYE, Judge  
THOMAS H. HOWARD, Clerk,  
By Chell M. Smith, Chief Deputy.

(Before Joyce, J.)

United States of America, Plaintiff,  
No. 1147 vs. Civil  
Munsingwear, Inc., Defendant.

Order granting motion for dismissal, made and filed.  
(See Civil Order Book.)

Pursuant to Order filed and entered herein on the 2nd day of June, 1948, granting defendant's motion to dismiss Count II of the complaint herein, it is now

Considered, Ordered And Adjudged: that the treble damage action under Count II of the complaint herein, be, and the same is hereby dismissed.

Further Ordered: that all further proceedings herein be, and the same are hereby stayed for a period of ten (10) days from and after this date for such further action as this plaintiff may be advised to take under the provisions of Supreme Court Rules 59 and 62 governing Civil Procedure.

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[fol. 117] (Judgment in Case No. 1463, Civil;  
June 2, 1948.)

In the District Court of the United States in and for  
the District of Minnesota, Fourth Division.

Term Minutes.

June 2, 1948.

March Term, A. D. 1948.

Tuesday morning.

Court opened pursuant to adjournment.

Present: Honorable MATTHEW M. JOYCE, Judge  
Honorable GUNNAR H. NØRDBYE, Judge

THOMAS H. HOWARD, Clerk.

By Chell M. Smith, Chief Deputy.

(Before Joyce, J.)

United States of America, Plaintiff,

No. 1463 vs. Civil

Munsingwear, Inc., Defendant.

Order granting motion for dismissal made and filed.  
(See Civil Order Book.)

Pursuant to Order filed and entered herein on the 2nd day of June, 1948, granting defendant's motion to dismiss the complaint herein, it is now

Considered, Ordered and Adjudged: that the above entitled cause be and the same is hereby dismissed.

Further Ordered: that all further proceedings herein, be, and the same are hereby stayed for a period of ten (10) days from and after this date for such further action as this plaintiff may be advised to take under the provisions of Supreme Court Rules 59 and 62 governing Civil Procedures.

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[fol. 118] (Recital relating to Orders of District Court substituting Paul A. Porter as Administrator of Office of Price Administration in the place of Chester Bowles as Administrator of Office of Price Administration, and Substituting United States as a Party in place and stead of Chester Bowles.)

"Both cases numbered 1147 and 1463 were originally instituted in the name of Chester Bowles as Administrator of the Office of Price Administration. Under date of March 1, 1946, Paul A. Porter, as Administrator of the Office of Price Administration was substituted by order of the District Court, as a party in place and stead of Chester Bowles in both of these cases. Under date of April 12, 1948 the United States was substituted by order of the District Court as a party in place and stead of Chester Bowles in both of these cases."

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[fol. 119] (Notice of Appeal in Case No. 1147, Civil.)

United States District Court,  
District of Minnesota, Fourth Division.

United States of America, Plaintiff,

No. 1147 vs. Civil

Munsingwear, Inc., a Corporation, Defendant.

Notice Is Hereby Given, that the Plaintiff above named, by and through the undersigned United States Attorney for the District of Minnesota, hereby appeals to the Circuit Court of Appeals for the Eighth Circuit from the final judgment entered in this action on June 2, 1948.



Express directions for said appeal have been given by the Attorney General of the United States.

Dated: July 29, 1948.

VICTOR E. ANDERSON,  
United States Attorney.

Copy of this Notice to be sent to:  
JOHN M. PALMER, and  
STINCHFIELD, MACKALL,  
CROUNSE & MOORE,  
Attorneys for Defendant,  
1100 First National-Soo Line Bldg.,  
Minneapolis 2, Minnesota.

Copy of foregoing Notice of Appeal mailed to John M. Palmer, Esq. and Messrs. Stinchfield, Mackall, Crouse & Moore at 1100 First National-Soo Line Bldg., Minneapolis 2, Minnesota, this 2nd day of August, 1948.

THOMAS H. HOWARD,  
Clerk.

By Chell M. Smith,  
Chief Deputy.

Endorsed: Filed in U. S. District Court on July 30, 1948.

[fol. 120] (Notice of Appeal in Case No. 1463, Civil.)

United States District Court,  
District of Minnesota, Fourth Division.

United States of America, Plaintiff,  
No. 1463 vs. Civil  
Munsingwear, Inc., a corporation, Defendant.

Notice Is Hereby Given, that the Plaintiff above named, by and through the undersigned United States Attorney for the District of Minnesota, hereby appeals to the Circuit Court of Appeals for the Eighth Circuit from the final judgment entered in this action on June 2, 1948.

Express direction for said appeal have been given by the Attorney General of the United States.

Dated: July 29, 1948.

VICTOR E. ANDERSON,  
United States Attorney.

Copy of this Notice to be sent to:  
JOHN M. PALMER, and  
STINCHFIELD, MACKALL,  
CROUNSE & MOORE,  
Attorneys for Defendant,  
1100 First National-Soo Line Bldg.,  
Minneapolis (2), Minnesota.

Copy of foregoing Notice of Appeal mailed to John M. Palmer, Esq. and Messrs. Stinchfield Mackall Crouse & Moore at 1100 First National-Soo Line Bldg., Minneapolis 2, Minnesota this 2nd day of August, 1948.

THOMAS H. HOWARD,  
Clerk.  
By Chell M. Smith,  
Chief Deputy.

Endorsed: Filed in U. S. District Court on July 30, 1948.

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[fol. 131] (Stipulation of Consolidation of Cases Nos. 1147, Civil; and 1463, Civil.)

United States District Court,  
District of Minnesota, Fourth Division.

No. 1147 Civil (Second Count).

United States of America, Plaintiff  
No. 1463 vs. Civil

Munsingwear, Inc., a corporation, Defendant.

It Is Hereby Stipulated And Agreed, by and between the parties hereto, through their respective counsel, as follows:

That the appeal taken by the United States, taken from the final judgment heretofore entered in Civil No. 1147 (second count), Fourth Division, District of Minnesota, and the appeal taken by the United States from the final judgment heretofore entered in Civil No. 1463, Fourth Division, District of Minnesota, involve the same questions and no sound reason exists why these two cases should not be consolidated for the purpose of the appeals which have been taken. ~~That it~~ is agreed that the Court may enter the attached proposed Order consolidating the two cases for appeal without any other or further notice to the parties or their attorneys.

Dated, this 22nd day of November, 1948.

JOHN W. GEAFF,  
United States Attorney,  
District of Minnesota,  
221 Federal Courts Bldg.,  
St. Paul (2), Minnesota,  
Attorney for Appellant.

STINCHFIELD MACKALL  
CROUNSE & MOORE,  
By JOHN M. PALMER,  
1100 First National-Soo Line Bldg.,  
Minneapolis, Minnesota,  
Attorney for Appellee.

[fol. 132] (Order consolidating Cases Nos. 1147, Civil, and 1463, Civil.)

United States District Court,  
District of Minnesota, Fourth Division

No. 1147 Civil (Second Count.)

United States of America, Plaintiff,  
No. 1463 vs. Civil  
Muusingwear, Inc., a corporation, Defendant.

Pursuant to the attached Stipulation, upon the files and records herein, and for good cause shown,

It Is Hereby Ordered, that for the purpose of the appeals which have been taken by the United States from the final judgments heretofore entered on June 2, 1948, in Civil No. 1147 (second count) and in Civil No. 1463, that the two cases are hereby consolidated.

Dated at Minneapolis, Minnesota, this 22nd day of November, 1948.

MATTHEW M. JOYCE,  
United States District Judge.

Endorsed: Filed in U. S. District Court on November 22, 1948.

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[fol. 136] Statement and Stipulation as to Contents of  
Printed Record.

United States Court of Appeals  
Eighth Circuit.

United States of America, Appellant,  
Nos. 13876-5 vs. Civil  
Munsingwear, Inc., Appellee.

There was a previous appeal to this Court in No. 1147, the appeal being numbered 13,391 in this Court. We deem it inadvisable to reprint in the printed record for these appeals much of the material that is now contained in the printed record in Case No. 13,391. In lieu of such reprinting a reference to applicable material will be made in the index to the volume and page number of the printed record in Case No. 13,391.

It is hereby stipulated by and between the above named parties, through their respective counsel, that the printed record in the two above captioned appeals contain the following:

1. Complaint in Case No. 1147.
2. Answer in Case No. 1147 (exhibits attached to Answer are to be omitted).
3. Pre-Trial Order in Case No. 1147.
4. Statement, Brief and Argument of Plaintiff in Case No. 1147, in the District Court, filed on about June 26,

1945 in said cause, part of concluding paragraph thereof as follows:

"This case, as previously stated, is being tried on the injunction count. It is not a case for any consideration of usual equitable issues presented in injunction cases. Normally, the Court exercises his discretion as to whether an injunction should issue under the doctrine of *The Hecht Co. vs. Bowles*, 321 U. S. 321. Here, however, the parties are at odds on a question of law, and the injunction is sought to settle that issue."

5. Opinion of District Court in Case No. 1147.
6. Findings of Fact, Conclusions of Law and Order for Judgment in Case No. 1147.
7. Judgment in Case No. 1147.
8. Complaint in Case No. 1463.

[fol. 137] 9. Notice of Motion in Case No. 1463, dated July 2, 1945, served and filed by the defendant, and the following statement:

"The Notice of Motion was accompanied by a typewritten motion of the defendant interposing the defense under Rule 12 (b), subdivision 6, that the complaint fails to state a claim on which relief can be granted and a motion to dismiss on said ground, together with a motion in the alternative to compel the plaintiff to make his complaint more definite and certain, in the event that the motion to dismiss be denied."

10. Motion of Defendant to Dismiss Cases No. 1147 and 1463.

11. Affidavit of John M. Palmer, and Exhibits A and B attached thereto.

12. Order of District Court granting motion of defendant to dismiss in Cases No. 1147 and 1463.

13. Judgment in Case No. 1147.

14. Judgment in Case No. 1463.

15. The following Statement:

"Both cases numbered 1147 and 1463 were originally instituted in the name of Chester Bowles as Administrator



of the Office of Price Administration. Under date of March 1, 1946, Paul A. Porter, as Administrator of the Office of Price Administration was substituted by order of the District Court, as a party in place and stead of Chester Bowles in both of these cases. Under date of April 12, 1948 the United States was substituted by order of the District Court as a party in place and stead of Chester Bowles in both of these cases."

16. Notice of Appeal in Case No. 1147.
17. Notice of Appeal in Case No. 1463.
18. Stipulation of consolidation of cases Nos. 1147 and 1463.
19. Order of District Court consolidating cases Nos. 1147 and 1463.
20. Stipulation as to Contents of Printed Record.

Dated: December 31, 1948.

**JOHN W. GRAFF,**  
United States Attorney,  
District of Minnesota,  
221 Federal Courts Bldg.,  
St. Paul 2, Minnesota,  
Attorney for Appellant.

**STINCHFIELD, MACKALL,  
CROUNSE & MOORE,**  
By **JOHN M. PALMER,**  
1100 First National-Soo Line Bldg.,  
Minneapolis, Minnesota,  
Attorney for Appellee.

Endorsed: Filed in U. S. Court of Appeals January 6, 1949.

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[fol. 1] (Supplemental Record, Filed in United States  
Court of Appeals March 24, 1949.)

United States District Court  
District Of Minnesota  
Fourth Division.

Paul A. Porter, Administrator, Office Of Price  
Administration, Plaintiff,  
Nos. 1147 and 1463. vs. Civil.  
Munsingwear, Inc., a corporation, Defendant.

Notice of Motion of Defendants to Dismiss.

To: Victor E. Anderson  
United States Attorney  
Attorney for Plaintiff  
221 Federal Courts Building  
St. Paul 2, Minnesota

Please take notice that the undersigned will bring the at-  
tached motion on for hearing before the above named Court  
at the United States Courthouse, Third and Marquette  
Avenues, Minneapolis, Minnesota at 10:00 A. M. on Feb-  
ruary 9, 1948 or as soon thereafter as counsel can be heard.

Dated at Minneapolis, Minnesota this 30th day of Jan-  
uary, 1948.

F. H. STINCHFIELD,

JOHN M. PALMER,

STINCHFIELD, MACKALL,  
CROUNSE & MOORE,

Attorneys for defendant.

1100 First National-Soo Line Building,  
Minneapolis, Minnesota.

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[fol. 2] (Motion of Defendant to Dismiss, filed February 3, 1948.)

Comes now the defendant in the actions above entitled and in response to the motion of the United States District Attorney for an order substituting the United States of America as plaintiff in the above actions, defendant moves the Court for an order dismissing said actions on the following grounds:

1. It appears from the record in the case numbered Civil 1147 that a final judgment on the merits was entered on January 19, 1946 dismissing said cause; that said judgment has never been reversed, over-ruled, or modified; and that said judgment stands as a bar and an estoppel to any further proceedings in said action.

2. It appears from the record in the case numbered Civil 1463 which is between the same parties as those in case 1147 that said action 1463 is a supplemental action based on a supplemental complaint to said action numbered 1147 Civil; that on January 19, 1946, a final judgment on the merits was filed and docketed in the main action numbered 1147 Civil; that said judgment has never been reversed, overruled or modified; and that said judgment stands as a bar and an estoppel to any further proceedings in said action numbered 1463 Civil.

[fol. 3] 3. Counsel for the predecessor plaintiffs represented to the Court and opposing counsel in the course of litigating case number 1147 that a final determination of case 1147 would end all pending litigation; that in reliance upon said representations counsel entered into a pre-trial stipulation and followed an agreed course of procedure; that there has been a determination of case 1147 and a final judgment entered therein on January 19, 1946; and that counsel for the succeeding plaintiff is estopped by said representations and agreements from proceeding further with said cases 1147 and 1463.

4. The actions numbered 1147 and 1463 Civil have abated under Rule 25 (d) of the Rules of Civil Procedure for the District Courts of the United States and Section 780 of Title 15 of U. S. C. A. as shown by the following:

(a) That Paul A. Porter, Administrator of the Office of Price Administration and an officer of the United States, resigned and ceased to hold office on December 12, 1946. He was succeeded by Philip B. Fleming, Administrator of the Office of Temporary Controls on December 12, 1946 who succeeded to the office and official duties of Paul A. Porter, Administrator of the Office of Price Administration, under Executive Order 9809 (11 F. R. 14281).

(b) That on March 19, 1947 Philip B. Fleming as said Administrator of the Office of Temporary Controls served a motion to be substituted as plaintiff in actions 1147 and [fol. 4] 1463 in the place of Paul A. Porter as Administrator of the Office of Price Administration. That said motions were heard on April 14, 1947 and in connection with the motions counsel for Philip B. Fleming, Administrator, advised the Court that in view of the appeal pending in the Circuit Court of Appeals in case 1147 it was unnecessary for the Court to pass upon the motions, and would not be necessary to pass upon the motions and to consider a substitution unless the judgment in action 1147 was reversed. At that time, as well as in the present, the said final judgment entered on January 19, 1946 in case 1147 stood as a bar to further proceedings in cases 1147 and 1463. The said motions were not determined and no substitution has been made.

(c) That at no time within the period of six months from the date that Philip B. Fleming succeeded to the office and official duties of Paul A. Porter, Administrator of the Office of Price Administration, has it been satisfactorily shown to the Court that there is a substantial need for continuing and maintaining the actions 1147 and 1463, but on the contrary the showing was that there was no need for substitution and there would be no need for substitution, unless the said final judgment was reversed.

5. The actions numbered 1147 and 1463 Civil have abated under Rule 25 (d) of the Rules of Civil Procedure for the District Courts of the United States and Section 780 of Title 15 U. S. C. A. upon the further grounds:

(a) That by Executive Order 9842 (12 F. R. 2646) effective June 1, 1947 the Attorney General was authorized [fol. 5] and directed to conduct, maintain, and defend, in



the name of the United States or otherwise as permitted by law, litigation against violators of OPA price regulations, price schedules or orders.

(b) That by virtue of said Executive Order, the Attorney General on June 1, 1947 became the successor in office to Philip B. Fleming, Administrator of the Office of Temporary Controls, insofar as the conduct and maintenance of litigation is concerned. Under said Executive Order and by law, the Attorney General is the party entitled to conduct and maintain said OPA litigation; that the United States is a party in name only, if at all; and that the real party in interest is Tom Clark, Attorney General of the United States. That by law and particularly Section 205 (e) of the Emergency Price Control Act (§ 925 (e), Title 50 U. S. C. A. Appendix) as said Section has been construed and administered, the action for damages under said law must be brought by the person who occupies the office of Administrator of the Office of Price Administration or the person who succeeds to all or any part of the duties of said office.

(c) That the notice and motion of the United States Attorney for substitution of the United States of America was not served until January 29, 1948 which was more than six months after the Attorney General succeeded to the office and official duties pertaining to litigation of Philip B. Fleming, Administrator of the Office of Temporary Controls. That the said motion for substitution is noticed for hearing on February 9, 1947 which is more than six months after the Attorney General succeeded to the office and official duties pertaining to litigation of Philip B. Fleming, Administrator of the Office of Temporary Controls, and, consequently, there can be no showing of a substantial need to continue and maintain the cases within the period of six months from the date on which the successor took office as required by said Rule 25 (d).

(d) That there is no need for continuing and maintaining said actions for the reasons:

(1) That the actions are barred by the final judgment in case 1147;

(2) That the successor plaintiff is estopped by said statements and representations made by counsel for prior



plaintiffs which were relied upon in the pursuit of a certain course of procedure in the litigation of case 1147;

(3) That the complaint in case 1463 fails to state a claim for the reasons and upon the grounds set out in a motion of defendant on file and of record in said case.

6. The motion of the United States of America for substitution as party plaintiff in said actions 1147 and 1463 should be denied and the actions dismissed regardless of [fol. 7] whether substitution is sought under Rule 25 or Rule 15 of the Rules of Civil Procedure for the District Courts of the United States, for the reasons:

(a) The said actions are barred by the final judgment in action 1147;

(b) The successor plaintiff is estopped by said statements and representations of counsel for predecessor plaintiffs which were relied upon by the course of procedure adopted in litigating case 1147; and

(c) The actions are barred under Sec. 12 of the Price Control Extension Act of 1946 (§ 925 (e) of Title 50, U. S. C. A., Appendix) which provides that the Administrator shall not institute or carry on a damage action under Section 205 (e) of the Emergency Price Control Act, if the violation arose because the person selling the commodity acted upon the written advice and instructions of the Administrator, any regional administrator, or district director of the Office of Price Administration.

The foregoing motion will be made upon all the files, records and proceedings in said action numbered 1147 Civil and action numbered 1463 Civil and upon the affidavit of John M. Palmer hereto attached.

Respectfully submitted,

F. H. STINCHFIELD,

JOHN M. PALMER,

STINCHFIELD, MACKALL,

CROUNSE & MOORE,

Attorneys for derendant,

1100 First National-Soo Line Building,  
Minneapolis, Minnesota.

[fol. 8] (Affidavit of John M. Palmer.)

State Of Minnesota,

County Of Hennepin.—ss.:

John M. Palmer, being first duly sworn, deposes and says:

He is one of the attorneys for the defendant in the action above entitled and at all times herein material was in charge of the litigation in case number 1147 which was commenced on June 9, 1944 by Chester Bowles, Administrator, Office of Price Administration, against the above named defendant.

The complaint in action 1147 is divided into two counts, Count I being a claim under Section 205 (a) of the Emergency Price Control Act for injunctive relief and Count II being a claim under Section 205 (e) of the Emergency Price Control Act for the recovery of treble damages. Both counts were based on the identical claim that defendant had violated Maximum Price Regulation No. 221 as amended on November 21, 1942 in selling fall and winter knitted underwear at prices in excess of those permitted by the regulation. On August 9, 1944, defendant answered both counts, denying the alleged violations and affirmatively alleging that it had complied in all respects with the regulation. [fol. 9] In December, 1946, defendant filed answers to interrogatories and amended interrogatories served on it by plaintiff.

Commencing on about February 6, 1945, counsel for the respective parties took part in a pre-trial conference in the Court's chambers pursuant to a notice and motion. At the conference, counsel for defendant submitted charts and other evidence, and asked counsel for plaintiff for certain admissions in respect thereto in order to simplify the trial. In the course of considering the evidence and other matters relative to plans for handling the trial, counsel for the plaintiff suggested that Count I, the injunction case, be tried, because it presented the single issue of whether defendant had violated the regulation. He suggested that Count II, the treble damage case, be held in abeyance until the injunction case was determined, because the issue of violation was the same in both cases and a determination

of that issue in the injunction case would determine the same issue in the treble damage case. He explained that if the issue of violation was determined in plaintiff's favor in the injunction case, it would leave for determination by the Court the simple issue of the amount and measure of damages in the treble damage case, whereas if the injunction case was determined in defendant's favor, it would end the litigation. Upon these statements and explanations, affiant entered into a pre-trial stipulation, as follows:

"The Court shall first determine the issues on Count I of the Complaint, which is the injunction count, and the second count of the Complaint which is the treble damage count, shall be held in abeyance until the injunction case has been determined."

[fol. 10] Pursuant to this pre-trial stipulation, the injunction case was tried in May, 1945. The case was briefed over the summer months, and the case was heard upon oral argument in September, 1945.

On June 6, 1945, plaintiff commenced action 1463 against the defendant claiming that defendant had violated the same Maximum Price Regulation as amended at times subsequent to the period covered in action 1147, the first action. Case number 1463 sought damages, only, under Section 205 (e) of the Emergency Price Control Act. On about July 2, 1945, defendant served and filed a motion to dismiss on the ground that the complaint did not state a claim and a motion to make the complaint more definite and certain. Pursuant to the pre-trial stipulation and by agreement with opposing counsel, the motions were held in abeyance pending the determination of case 1147.

On October 22, 1945, the Court made and filed its opinion in case 1147 holding that defendant had not violated Maximum Price Regulation No. 221 and requesting defendant to submit findings of fact and conclusions of law. After conference with counsel for both parties, the Court, on January 19, 1946, filed its findings that defendant had not violated the regulation and ordered the case dismissed. On that date, January 19, 1946, final judgment was entered dismissing the case.

On March 26, 1946, counsel for plaintiff served a notice of appeal from the final judgment. The record was filed and docketed in the Circuit Court of Appeals for the Eighth Circuit on about August 7, 1946. Plaintiff filed his brief in said Circuit Court of Appeals on about November 25, 1946. On March 21, 1947, defendant filed its answering brief and [fol. 11] a motion in the alternative to dismiss the appeal or affirm the judgment on the ground that plaintiff had failed to comply with Rule 11 (b) Fourth of the Circuit Court of Appeals. On April 29, 1947, defendant served and filed a second motion to dismiss on the ground that the case was moot. The appeal was argued on May 6, 1947, and on June 19, 1947, the Circuit Court of Appeals ordered a dismissal of the appeal on the grounds set out in both of defendant's motions. The dismissal of the appeal was outright and without any qualification of the final judgment of the District Court in case 1147.

After the appeal had been taken by plaintiff, affiant received a notice under date of August 24, 1946 from the Clerk of the District Court, advising that case 1463 would be placed on the September 1946, calendar for disposition under Rule 3 of the District Court Rules. Rule 3 requires the Clerk to place all cases at issue for one year or more on the calendar upon thirty days' notice to counsel, and such cases must either be tried or dismissed, unless the Court, for good cause shown, orders some other disposition. A true copy of the Clerk's notice is attached hereto, marked Exhibit "A", and incorporated herein by reference. In response to said notice, affiant wrote a letter to the Clerk under date of August 24, 1946 advising him of the final judgment and appeal taken therefrom in case 1147, and of defendant's motion in case 1463. In that letter, affiant called attention to an agreement made with OPA counsel in July, 1945, that the motion be continued until after the disposition of the injunction suit in case 1147, and suggested that the matter be continued to the next term or set down for argument. A true copy of affiant's letter of August 24, 1946 is attached hereto, marked Exhibit "B", and incorporated herein by reference. A copy of said letter was sent to counsel for OPA in St. Paul. Upon receipt of affiant's letter, counsel for OPA got in touch with affiant and discussed the status of the appeal and pending cases. Af-



fiat called attention to the fact that the injunction case in 1147 presented the primary issue of whether the OPA regulation had been violated, that the Court had determined the issue in defendant's favor, and that appeal had been taken from the judgment entered on the merits. OPA counsel responded by saying that there would be no sense in proceeding with any matters in case 1463 unless and until the Circuit Court of Appeals should reverse the judgment in 1147. Affiant and counsel for OPA then reached agreement that the motion in 1463 should not be set down for hearing and that they would appear at the calendar call to ask that the case be continued over the term. At the calendar call, affiant made a showing to the Court that case 1463 involved the same parties, the same OPA regulation, and the same issue of violation as in case 1147, except that a period of sales subsequent to those in 1147 were set out; that a final judgment had been entered for defendant in the injunction case in 1147 from which an appeal had been taken; and that the final determination of case 1147 would dispose of case 1463, unless the Circuit Court of Appeals reversed 1147. Counsel for OPA present at the hearing made no contrary showing but acquiesced, and case 1463 was ordered to be continued over the term. At the calendar call in March, 1947, the case was again continued upon a similar showing.

While the appeal was pending in the Circuit Court of Appeals for the Eighth Circuit, counsel for the plaintiff served a motion in case 1147 and in case 1463 to substitute Philip B. Fleming, Administrator of the Office of Temporary Controls, in place of Paul A. Porter, Administrator of the Office of Price Administration, as the party plaintiff in both actions. The motions were served on about March 19, 1947 and were heard on April 14, 1947. Defendant appeared and argued in opposition to the substitution. Near the conclusion of the arguments, the Court asked affiant about the status of the appeal in case 1147. Affiant responded by stating that the OPA had filed its brief; that affiant had filed defendant's brief and a motion to dismiss on March 21, 1947; and that the case had been set down for oral argument on May 6, 1947. The Court then asked counsel for the plaintiff if there was any need to pass upon the motions for substitution before the Circuit



Court of Appeals had determined the appeal. Counsel for plaintiff responded by saying that there was no need for the Court to pass on the motions and that there would never be any need for substitution unless the Circuit Court reversed. Upon this statement, the Court has at no time passed upon the motions and they remain pending and undetermined.

Further affiant sayeth not, except that this affidavit is made in support of defendant's motion to dismiss said actions 1147 and 1463.

JOHN M. PALMER.

Subscribed and sworn to before me this 30th day of January, 1948.

DELORES SCHERER,  
Notary Public, Hennepin County, Minnesota.

My Commission Expires: 2-24-50.

[fol. 14] Exhibit "A", Notice to Counsel:

Minneapolis, Minn.

August 24, 1946

The above entitled cause will be placed on the September 1946 term calendar of this Court at Minneapolis for disposition under the provisions of the fourth paragraph of Rule 3 of the Rules of the United States District Court for the District of Minnesota.

This calendar will be called on Tuesday morning, September 24, 1946 at ten o'clock.

Please be governed accordingly.

By The Court

THOMAS H. HOWARD,  
Clerk.

By Chell M. Smith,  
Chief Deputy.

To: Stinchfield, Mackall, Crounse & Moore.

No. 1213 Civil Paul A. Porter, etc., vs. Zephyr Oil Co.  
1463 " Paul A. Porter, etc., vs. Munsingwear, Inc.

[fol. 15]

## Exhibit "B".

(Letter, Stinchfield, Mackall, Crounse & Moore to Clerk  
of U. S. District Court.)

August 24  
1946

Clerk of United States District Court  
Federal Court House  
Minneapolis 1,  
Minnesota

Re: Porter as Administrator of  
OPA vs. Munsingwear, Inc.  
Civil Action No. 1463

Dear Sir:

We are in receipt of your notice of August 24, 1946, advising us that the above action will be called for trial on September 24, 1946. In response to your notice, we believe you should be advised of the status of this case.

The above entitled action is the second of two cases so commenced against Munsingwear, Inc. by the OPA, growing out of transaction litigated before the Honorable Matthew M. Joyce in the year 1945, and which resulted in a judgment for defendant, entered on January 19, 1946. The OPA has taken an appeal from this judgment and the case is now pending in the Circuit Court of Appeals for the Eighth Circuit. In the litigated case, the action was a combined injunction and treble damage case in which counsel agreed to litigate the injunction action and to hold the treble damage action in abeyance until the determination of the injunction suit. For reasons best known to the OPA, and apparently involving some question relating to the short statute of limitations in the Emergency Price Control Act, the OPA commenced a second treble damage suit, which is the action noted above.

As attorneys for the defendant, we interposed a motion in the alternative to dismiss on the ground that the complaint in the second suit did not state facts sufficient to con-

stitute a claim or to require the plaintiff to make his complaint more definite and certain. By agreement with Mr. Greenberg and Mr. Witherall, then counsel for OPA, it was agreed that the hearing on the motion of the defendant would be continued until after the disposition of the injunction suit litigated before Judge Joyce. There has been no change in this understanding with counsel for OPA since it was made in July of 1945.

In view of the status of this case, covered by your notice of August 24, 1946, we would suggest that the matter be continued over to the next term or set down for argument on our motion to dismiss or for a more definite statement of the complaint.

We are sending a copy of this letter to Mr. Harris Nuerenberg, Chief Counsel of the Office of Price Administration in St. Paul.

Very truly yours,

STINCHFIELD, MACKALL,  
CROUNSE & MOORE.

By.....

Endorsed: Filed in U. S. District Court on February 3, 1948.

[fol. 16]

Stipulation.

United States Court Of Appeals  
Eighth Circuit

United States Of America, Appellant,  
Nos. 13,875-6. vs. Civil.  
Munsingwear, Inc., a Corporation, Appellee.

It is hereby stipulated and agreed by and between the parties, through their respective counsel, that a certified copy of the motion of defendant (Appellee) to dismiss, together with the notice thereof dated January 30, 1948 and filed February 3, 1948, and the exhibits attached thereto, may be filed in the above Court as a supplemental record

and may be printed and added at the end of the present printed record in the appeal of said action.

Dated March 21st, 1949.

**JOHN W. GRAFF,**  
United States Attorney,  
District of Minnesota,  
221 Federal Courts Building,  
St. Paul 2, Minnesota,  
Attorney for Appellant.

**STINCHFIELD, MACKALL,  
CROUNSE & MOORE,**  
By John M. Palmer,  
1100 First National-Soo Line Build-  
ing,  
Minneapolis 2, Minnesota,  
Attorneys for Appellee.

Endorsed: Filed in U. S. District Court on March 22,  
1949.

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• • • • •

And thereafter the following proceedings were had in said causes in the United States Court of Appeals for the Eighth Circuit, viz:

(Appearance of Counsel for Appellant in Cause No. 13875.)

United States Court of Appeals, Eighth Circuit

No. 13875

UNITED STATES OF AMERICA, APPELLANT,

vs.

MUNSINGWEAR, INC.

The Clerk will enter my appearance as Counsel for the Appellant.

JOHN W. GRAFF,  
*United States Attorney.*

(Endorsed): Filed in U. S. Court of Appeals, Dec. 4, 1948.

(Appearance of Counsel for Appellee in Cause No. 13875.)

The Clerk will enter my appearance as Counsel for the Appellee.

F. H. STINCHFIELD,  
JOHN M. PALMER,  
STINCHFIELD, MACKALL, CROUNSE & MOORE,  
1100 First National-Soo Line Bldg.,  
Minneapolis, Minnesota.

(Endorsed): Filed in U. S. Court of Appeals, Dec. 2, 1948.

(Appearance of Counsel for Appellant in Cause No. 13876.)

United States Court of Appeals, Eighth Circuit

No. 13876

UNITED STATES OF AMERICA, APPELLANT,

vs.

MUNSINGWEAR, INC.

The Clerk will enter my appearance as Counsel for the Appellant.

JOHN W. GRAFF,  
*United States Attorney.*

(Endorsed): Filed in U. S. Court of Appeals, Dec. 4, 1948.



(Appearance of Counsel for Appellee in Cause No. 13876.)

The Clerk will enter my appearance as Counsel for the Appellee.

F. H. STINCHFIELD,  
JOHN M. PALMER,  
STINCHFIELD, MACKALL, CROUNSE & MOORE,  
1100 First National-Soo Line Bldg.,  
Minneapolis, Minnesota.

(Endorsed): Filed in U. S. Court of Appeals, Dec. 2, 1948.

(Order of Submission in Causes Nos. 13875 and 13876.)

United States Court of Appeals for the Eighth Circuit

September Term, 1949

Wednesday, September 14, 1949.

Appeal from the United States District Court for the District of  
Minnesota

No. 13875

UNITED STATES OF AMERICA, APPELLANT,

vs.

MUNSINGWEAR, INC.

and

Appeal from the United States District Court for the District of  
Minnesota

No. 13876

UNITED STATES OF AMERICA, APPELLANT,

vs.

MUNSINGWEAR, INC.

These causes, Nos. 13875 and 13876, having been called for hearing in their regular order, are argued together, and argument was commenced by Mr. John W. Graff, United States Attorney, for appellant, continued by Mr. John M. Palmer for appellee, and concluded by Mr. John W. Graff, United States Attorney, for appellant.

Thereupon, these causes were submitted to the Court on printed record, supplemental printed record and briefs of counsel filed

herein, and a copy of the printed record on the former appeal, No. 13,391, was handed to the Court.

(Opinion in Causes Nos. 13875 and 13876.)

United States Court of Appeals for the Eighth Circuit

No. 13875

Appeal from the United States District Court for the District of Minnesota

UNITED STATES OF AMERICA, APPELLANT,

vs.

MUNSINGWEAR, INC., A CORPORATION, APPELLEE

No. 13876

Appeal from the United States District Court for the District of Minnesota

UNITED STATES OF AMERICA, APPELLANT,

vs.

MUNSINGWEAR, INC., A CORPORATION, APPELLEE

[November 22, 1949]

Mr. John W. Graff, United States Attorney, for Appellant.

Mr. John M. Palmer (Mr. Frederick H. Stinchfield and Messrs. Stinchfield, Mackall, Crounse & Moore were with him on the brief) for Appellee.

Before SANBORN, JOHNSEN, and RIDDICK, Circuit Judges.

SANBORN, Circuit Judge, delivered the opinion of the Court.

The question for decision is whether the unconditional dismissal by this Court of an appeal from a judgment of a District Court, entered after a trial on the merits of a case controlled by federal law, prevents the judgment from becoming a bar to the relitigation, in a subsequent action between the same parties upon a different claim, of the identical issue determined by the judgment, if the dismissal of the appeal was based upon the conclusion that the case had become moot.

These appeals are from judgments dismissing two actions for treble damages, upon the ground that an identical and controlling issue in each had been previously tried and determined in a prior action and that the judgment in that action barred the relitigation of the issue.

There is no substantial dispute as to the pertinent facts. On June 9, 1944, Chester Bowles, Administrator, Office of Price

Administration, filed a complaint in the District Court against Munsingwear, Inc. (No. 13,875 in this Court). Two claims were stated in the complaint in two separate counts. The first was for an injunction, under § 205(a) of the Emergency Price Control Act of 1942 as amended [50 U.S.C.A. Appendix, § 925(a)], to prevent the alleged violation by the defendant of Maximum Price Regulation No. 221 as amended. The second was for treble damages under § 205(e) of the same Act [50 U.S.C.A. Appendix, § 925(e)]. Each of the counts charged that the defendant had violated and was violating the Regulation in the pricing of its goods. In its answer the defendant denied that it had violated the Regulation.

By agreement of the parties and a pretrial order of the District Court, the treble damage claim stated in the second count of the complaint was to be held in abeyance until the final adjudication of the claim for an injunction stated in the first count.

On June 6, 1945, the same plaintiff brought another action against the defendant for treble damages under § 205(e) of the Act for the alleged violation of the same price regulation during the year subsequent to the period covered by the complaint in the first action. (The second action is No. 13,876 in this Court.) This action, by agreement, was continued pending the outcome of the trial of the first or injunction count of the complaint in the first action.

The sole issue under the injunction count (Count One of the complaint in the first action) was whether the defendant had or had not violated Maximum Price Regulation No. 221 in the pricing of its goods. If that issue were to be finally adjudicated in favor of the defendant, the plaintiff would not be entitled to an injunction nor to treble damages. If, on the other hand, the issue were to be decided in favor of the plaintiff, the final judgment would settle the question of his right to an injunction and to damages, and the only remaining issue in the treble damage actions would be the amount which he was entitled to recover under the second count of the complaint in the first action and under the complaint in the second action.

The issue under the injunction count was tried to the District Court in May, 1945. The court filed its opinion on October 22, 1945 (63 F. Supp. 933). Findings of fact and conclusions of law were filed on January 19, 1946. The court determined that the defendant had "at all times complied in all material respects with MPR 221 as amended, and it is not and has not been in violation thereof." A judgment of dismissal was entered on January 19, 1946, from which an appeal was taken to this Court.

Paul A. Porter, as Administrator of the Office of Price Administration, succeeded Bowles as plaintiff. Porter was succeeded by Philip B. Fleming, Administrator, Office of Temporary Controls,

and Fleming was eventually succeeded by the United States, which was, of course, at all times the real party in interest.

On November 12, 1946, while the appeal from the judgment entered after the trial of the injunction count of the complaint in the first action was pending, the commodity involved was decontrolled by an Executive Order of the Price Administrator. The appeal was thereafter submitted to this Court upon two motions of the defendant (appellee): (1) a motion to dismiss the appeal or to affirm the judgment because of the failure of the plaintiff (appellant) to comply with the Rule of this Court relating to the statement of points relied upon in his brief; and (2) a motion to dismiss the appeal because the case had become moot due to the Executive Order decontrolling the commodity in suit. This Court's opinion is found in *Fleming v. Munsingwear, Inc.*, 162 F. 2d 125. After stating that it would be warranted in affirming the judgment appealed from for noncompliance by the appellant with Rule 11(b) Fourth of this Court (page 127 of 162 F.2d), the Court proceeded to consider the motion to dismiss on the ground that the case had become moot. That motion was sustained, and the appeal was dismissed (page 128 of 162 F.2d). The mandate of this Court was dated June 19, 1947, and shows that the dismissal of the appeal was based upon the conclusion that the case had become moot, and was not based upon a violation of any Rule of this Court.

On February 3, 1948, the defendant moved the District Court to dismiss the treble damage claims still pending against it, namely, the claim stated in Count Two of the complaint in the first action and the claim stated in the complaint in the second action. The ground for the motion was that the judgment on the first or injunction count of the complaint in the first action barred further proceedings on the treble damage claims.

The District Court, on June 2, 1948, entered an order directing its Clerk to enter a judgment of dismissal in each of the two treble damage actions. The order contained the following recital:

"At the hearing on said motions, it was conceded by counsel for the plaintiff that a redetermination of the same issues of violation of Maximum Price Regulation No. 221 as amended, as those determined by the judgment in said injunction action would be an essential prerequisite to the recovery of any damages in the said pending treble-damage actions, and he also conceded that he would submit the issues of violation in the treble-damage actions on the same record and evidence as that taken, transcribed and printed in said injunction action."

The contention of the Government on these appeals is stated in its brief as follows:

"When a party to a judgment cannot obtain the decision of an appellate court because the matter determined against him is moot, the judgment is not conclusive against him under the doctrine of *res judicata* in a subsequent action on a different cause of action."

The Government argues that "since the appeal from the judgment in the injunction suit was dismissed solely on the grounds of mootness and since the treble-damage actions are different causes of action [*Woodbury v. Porter*, 8 Cir., 158 F.2d 194; *Fleming v. Munsingwear, Inc.*, 8 Cir., 162 F.2d 125], the matters decided in the former suit are not conclusive by way of collateral estoppel in the instant action."

The main reliance of the Government in support of its contention is § 69(2), American Law Institute, Restatement of the Law of Judgments, which reads as follows:

"Where a party to a judgment cannot obtain the decision of an appellate court because the matter determined against him is immaterial or moot, the judgment is not conclusive against him in a subsequent action on a different cause of action."

We quote, also, Comment d. on Subsection (2) of § 69 (Restatement of the Law of Judgments, page 317):

"Where a judgment has been rendered against a party by a court of first instance, and on his appeal the appellate court refuses to review the proceedings because the controversy has become moot, the judgment is not binding in a subsequent action between the parties based upon a different cause of action."

This rule finds some support in *Gelpi v. Tugwell*, 1 Cir., 123 F.2d 377. There an appeal was taken from a judgment of the Supreme Court of Puerto Rico denying the appellant a writ of mandamus directing the Governor of Puerto Rico to reinstate her in the office from which she had allegedly been unlawfully removed. Before her appeal was ruled upon, the term of the office she had held had expired. Her case was dismissed as moot. The court said, however (page 378 of 123 F.2d):

"Since appellant, without fault on her part, is prevented from obtaining a review of the judgment below merely because, from intervening events, the appeal has become moot, that judgment will not become *res judicata* on the issues involved, in any subsequent litigation based upon a different cause of action. Appellant will be free to attack collaterally the executive order of removal, either in a suit for salary, or in an appropriate proceeding to test



her eligibility to hold certain civil offices should she later aspire thereto?"

Judge Magruder, in a dissenting opinion, expressed the view that, while it was too late to order appellant's reinstatement, a decree vacating the executive order of which she complained, would not be inappropriate, since it would settle the questions of her right to recover her unpaid salary and of her eligibility to hold other offices. In other words, Judge Magruder was of the opinion that the matter decided against her should not be regarded as moot. However, he said (page 379 of 123 F.2d):

"The opinion of the court, in dismissing the appeal as moot, reserves to appellant the right to raise in subsequent litigation the same issues which she sought to have us pass on in the present case. I agree that if the appeal is to be dismissed on this ground it would be most unjust to leave the judgment below standing as res judicata; and I think that the doctrine of res judicata is sufficiently flexible to avoid such a harsh result. Cf. *Blackman v. Stone*, 300 U. S. 641, 57 S.Ct. 514, 81 L.Ed. 856. But it seems to me unfortunate to put upon appellant the burden of subsequent litigation when, as I see it, these issues are legitimately before us for decision now."

In view of the reservations contained in the opinion in *Gelpi v. Tugwell*, *supra*, it can hardly be said that the dismissal of the appeal in that case was intended to be or was unconditional.

In *Allegheny County v. Maryland Casualty Co.*, 3 Cir., 146 F.2d 633 (certiorari denied, 325 U. S. 855), a case governed by Pennsylvania law, the court assumed that the law of that State was as stated in § 69(2) of the Restatement of the Law of Judgments.

The Government also refers to the case of *Leader v. Apex Hosiery Co.*, 3 Cir., 108 F.2d 71 (affirmed 310 U. S. 469), in which the Circuit Court of Appeals said, at page 81:

"The decree of this court in *Apex Hosiery Co. v. Leader*, *supra* [90 F.2d 155], was reversed by the Supreme Court with directions to dismiss the bill of complaint since the case was moot. *Leader v. Apex Hosiery Co.*, 302 U. S. 656, 58 S. Ct. 362, 82 L.Ed. 508. The decree of this court in the injunction proceedings must therefore be considered as having been vacated. It is no longer binding as a precedent, as the law of the case, or as res judicata. *South Spring Hill Gold Co. v. Amador Gold Co.*, 145 U. S. 300, 12 S.Ct. 921, 36 L.Ed. 712; *Brownlow v. Schwartz*, 261 U. S. 216, 43 S.Ct. 263, 67 L.Ed. 620. As a consequence we are at liberty to consider anew all questions presented by the record of the case at bar."

It will be noted, however, that in that case the direction of the Supreme Court to dismiss the complaint was regarded as tantamount to a vacation of the decree of the Circuit Court of Appeals. No unconditional dismissal of an appeal for mootness was involved in that case.

The Government is also of the opinion that the following State cases support its view; *Knowlton v. Town of Swampscott*, 280 Mass. 69, 181 N.E. 849, and *Rawlings v. Claggett*, 174 Miss. 845, 165 So. 620.

Our attention is also directed to an article by Professor Scott entitled, "Collateral Estoppel by Judgment," in the *Harvard Law Review*, 56 *Harvard L. Rev.* 1, in which the author makes the following statement (page 15):

"A judgment rendered by the trial court may not be conclusive by way of collateral estoppel because the unsuccessful party cannot obtain the decision of the appellate court upon the matter decided adversely to him. The fact that a party who might have appealed fails to do so is immaterial; but the fact that he is unable to appeal is of importance.

"One illustration of this is where an appeal is denied because the controversy has become moot. In such a case the judgment itself may stand, but the matters decided are not conclusive by way of collateral estoppel in a subsequent controversy between the parties involving a different cause of action."<sup>1</sup>

The defendant relies upon the doctrine of *res judicata* as defined by the Supreme Court of the United States. In *Southern Pacific R. Co. v. United States*, 168 U. S. 1, 48-49, that doctrine was stated as follows:

"The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.

In the instant cases, the "first suit", namely, the injunction count of the complaint in the first action, was tried upon the merits by a court of competent jurisdiction; the question whether the defendant was violating Maximum Price Regulation No. 221, as

<sup>1</sup> See notes in 157 *A.L.R.* 1041, 1043, with reference to Professor Scott's article, and with reference to Sec. 69(2) of Restatement of the Law of Judgments.

amended was "distinctly put in issue and directly determined" by the judgment entered in that action; and the "judgment in the first suit remains unmodified."

We note that in the Southern Pacific case the Supreme Court (on pages 49 and 51 of 168 U. S.) cites with approval and discusses its former decision in *Johnson Co. v. Wharton*, 152 U. S. 252, in which it was held that a second suit on a different claim was barred by the judgment in a prior suit, although that judgment was not reviewable because of the amount in dispute. The court, in *Johnson Co. v. Wharton*, said (page 261 of 152 U. S.):

"The inquiry, as to the conclusiveness of a judgment in a prior suit between the same parties can only be whether the court rendering such judgment—whatever the nature of the question decided, or the value of the matter in dispute—had jurisdiction of the parties and the subject-matter, and whether the question, sought to be raised in the subsequent suit, was covered by the pleadings and actually determined in the former suit. The existence or non-existence of a right, in either party, to have the judgment in the prior suit re-examined, upon appeal or writ of error, cannot, in any case, control this inquiry. \* \* \* Looking at the reasons upon which the rule rests, its operation cannot be restricted to those cases, which, after final judgment or decree, may be taken by appeal or writ of error to a court of appellate jurisdiction."

The rule upon which the defendant relies has apparently thus far not been modified, conditioned or overruled by the Supreme Court. In the recent case of *Commissioner v. Sunnen* (1948), 333 U.S. 591, 597, the Supreme Court said:

"It is first necessary to understand something of the recognized meaning and scope of *res judicata*, a doctrine judicial in origin. The general rule of *res judicata* applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Cromwell v. County of Sac*, 94 U. S. 351, 352. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. See Von Moschzisker, 'Res Judicata' 38 Yale L.J. 299; Restatement of the Law of Judgments, §§ 47, 48.

"But where the second action between the same parties is upon a different cause or demand, the principle of *res judicata* is applied

much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' *Cromwell v. County of Sac*, *supra*, 353. And see *Russell v. Place*, 94 U. S. 606; *Southern Pacific R. Co. v. United States*, 168 U. S. 1, 48; *Mercoird Corp. v. Mid-Continent Co.*, 320 U. S. 661, 671. Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. But matters which were actually litigated and determined in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel. In this sense, *res judicata* is usually and more accurately referred to as estoppel by judgment, or collateral estoppel. See Restatement of the Law of Judgments, §§ 68, 69, 70; Scott, 'Collateral Estoppel by Judgment,' 56 Harv. L. Rev. 1."

The opinion and mandate in *Fleming v. Munsingwear, Inc.*, *supra* (162 F.2d 125), disclose no intent or purpose on the part of this Court to affect the conclusiveness of the judgment appealed from. The dismissal of the appeal merely constituted a refusal to entertain an appeal in a case which this Court believed to have become moot. It is not conceivable to us that this refusal had the effect of emasculating the judgment of the District Court which was appealed from, or of reserving the issue determined by that judgment for relitigation by the parties in the treble damage actions.

We cannot accept the theory that the conclusiveness of the judgment of the District Court in the injunction action was affected by the reason given by this Court for the dismissal of the appeal from that judgment. Appeals are dismissed on many grounds, some due to the fault of the appellants and some to circumstances beyond their control. The logic of making a distinction between dismissals of appeals for mootness and dismissals on other grounds involving no fault of an appellant, escapes us, as does also the logic of impairing the conclusiveness of a judgment of a District Court because an appellate court refuses to entertain an appeal from the judgment. While the appeal is pending, the judgment is not final, but is presumptively correct. When the appeal is dismissed, the judgment, as we understand the law, becomes final and conclusive as between the parties with respect to all issues actually tried and determined.

While the question is not before us on this appeal, one reasonably can believe that where a judgment determines a vital issue



which controls, or will substantially affect, other pending litigation between the parties, an appeal from the judgment should not be dismissed for mootness merely because the relief prayed for by the plaintiff is no longer available. We think this is particularly true where the correctness of the determination of the issue by the trial court, rather than the relief sought, is the real matter in controversy between the parties. If dismissals of appeals for mootness are to be held to impair the conclusiveness of the judgments appealed from, it would seem advisable for the appellate courts to re-examine their standards for determining under what circumstances a case may be dismissed as moot.

We are satisfied that neither the District Court nor this Court would be justified in altering the doctrine of *res judicata* as it has thus far been enunciated by the Supreme Court. That doctrine is based upon a long-established and firmly entrenched public policy, upon which litigants have a right to rely. In *Tait v. Western Maryland Railway Co.*, 289 U.S. 620, 624, the Supreme Court went so far as to say:

"\* \* \* The public policy upon which the rule [*res judicata*] is founded has been said to apply with equal force to the sovereign's demand and the claims of private citizens. Alteration of the law in this respect is a matter for the law-making body rather than the courts."

Our conclusion is that the dismissal of the appeal by this Court in *Fleming v. Munsingwear, Inc.*, *supra* [162 F.2d 125], did not affect the conclusiveness of the judgment appealed from in that case as a final adjudication of the issue upon which the judgment was based, and that the judgment constitutes a bar to the relitigation of the issue determined.

The judgments appealed from are affirmed.

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JOHNSEN, Circuit Judge, dissenting.

To me the majority opinion is unsound (1) as a matter of general legal principle; (2) as an unnatural interpretation of the intended scope and effect of the dismissal in *Fleming v. Munsingwear, Inc.*, 8 Cir., 162 F.2d 125; and (3) on the basis of applicable estoppel.

1. I think the only logical rule in a situation such as is here presented is that set out in the Restatement, that "Where a party to a judgment cannot obtain the decision of an appellate court because the matter determined against him is immaterial or moot, the judgment is not conclusive against him in a subsequent action on a different cause of action." Restatement, Judgments, § 69(2).



See also Professor Austin W. Scott's article, "Collateral Estoppel by Judgment," 56 Harvard Law Review 1, and annotation, 157 A.L.R. 1043. The case of *Allegheny County v. Maryland Casualty Co.* clearly recognizes this as reflecting "the general statement of the law," and on this basis the court assumed the right to apply it as the law of Pennsylvania "in the absence of a specific decision on the point by the Pennsylvania Courts." *Gelpi v. Tugwell*, 1 Cir., 123 F.2d 377, 378, similarly has directly accepted the principle, in its statement that "since appellant, without fault on her part, is prevented from obtaining a review of the judgment below merely because, from intervening events the appeal has become moot, that judgment will not become res judicata on the issues involved, in any subsequent litigation based upon a different cause of action." The language, "that judgment will not become res judicata" etc., obviously means that the judgment necessarily, as a matter of law, is not res judicata, and it can hardly be read as a mere direction to insert a reservation in the order of dismissal in the particular case, for the order itself uses the unqualified language, just like our own in *Fleming v. Munsingwear, Inc.*, *supra*, "The appeal is dismissed." Also, I can find nothing in the decisions of the Supreme Court cited in the opinion of the majority that seems to me to preclude application of this rule. The specific question involved has never been passed upon by that Court, and I should doubt that it would accord the statements from its decisions quoted by the majority any such literal and justice-thwarting restrictiveness as has been done here. And incidentally, it might be observed that general citation of section 69 of the Restatement and of the article by Professor Scott, to which I have referred, at least has been made in *Commissioner v. Sunnen*, 333 U.S. 591, 597, 68 S.Ct. 715, 92 L.Ed. 898.

2. But apart from the application of the rule discussed, I think the majority opinion improperly fails to accord to our dismissal in *Fleming v. Munsingwear, Inc.*, 8 Cir., 162 F.2d 125, the scope and effect which it plainly was intended to have. The opinion on the motion to dismiss unmistakably indicates that the sole ground for dismissing the appeal was that no legal right to an injunction any longer existed in the situation. *Cañe* was taken expressly to point out that "the injunction case only was brought to this court;" that there had been an agreement and order in the trial court that "the second count of the complaint by which treble damages were sought should be held in abeyance;" that "there now being no law which would sustain the injunction sought by plaintiff, it seems clear that the case has become moot;" that "This court can concern itself only with actual controversies;" and that "The appeal will therefore be dismissed." 162 F.2d at pages 127, 128. It is impossible for me to see how anyone can derive any other meaning from this than that the court, on the basis of the motion and the facts before

it, was dealing solely with the question of whether the right to an injunction was any longer a litigable question; that it viewed the treble damage rights as being protected by the agreement and order in the trial court and as therefore being unaffected in the circumstances by a refusal to hear the injunction appeal on its merits; and that in this situation the court felt that it should not be asked to waste its time upon the injunctive right, which had ceased to exist. Any other reading seems to me an unnecessary refusal to give effect to the expressed intention and action of another division of this Court.

3. There is a third and independently conclusive ground upon which I think the majority opinion is unsound. Appellee's contention on the question of mootness in the injunction-case appeal was and necessarily could only be that no other question was involved on the motion to dismiss except the terminated right to the issuance of an injunction. If appellee was intending afterwards to assert that the issue of price violation in relation to the suspended treble-damage count was adjudicatively affected, then it had no basis for urging that the controversy as it was at that time before the court had become moot, and it can hardly escape the imputation of bad faith and wilful misrepresentation. I am willing to assume, however, that there was no bad faith at the time and that appellee's present position is a mere tactical afterthought. But in either situation, by my legal concepts, there is an estoppel to assert that the dismissal had any other scope or effect in appellee's favor than that which the motion claimed and on the basis of which it sought and induced the court's action. A litigant should not be permitted to profit from his misleading of the court, whether wilful or not. It has, of course, always been the rule that application of the doctrine of *res judicata* may be precluded by acts constituting an estoppel. See 30 Am. Jur., Judgments, § 207.

For each of the reasons given, I am compelled to dissent.

(Judgment in Cause No. 13875.)

United States Court of Appeals for the Eighth Circuit

No. 13875—November Term, 1949

Tuesday, November 22, 1949

UNITED STATES OF AMERICA, APPELLANT

*vs.*

MUNSINGWEAR, INC., A CORPORATION

Appeal from the United States District Court for the District of Minnesota.

This cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

November 22, 1949.

(Judgment in Cause No. 13876)

United States Court of Appeals for the Eighth Circuit

No. 13876—November Term, 1949

Tuesday, November 22, 1949

UNITED STATES OF AMERICA, APPELLANT

*vs.*

MUNSINGWEAR, INC., A CORPORATION

Appeal from the United States District Court for the District of Minnesota.

This cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

November 22, 1949.

## (Clerk's Certificate)

## United States Court of Appeals, Eighth Circuit

I, E. E. Koch, Clerk of the United States Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the printed record on which the appeals from the United States District Court for the District of Minnesota were heard in said Court of Appeals, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in said Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in certain causes in said Court of Appeals wherein the United States of America was Appellant and Munsingwear, Inc., a Corporation, was Appellee, No. 13875, and the United States of America was Appellant and Munsingwear, Inc., a Corporation, was Appellee, No. 13876.

I do further certify that with the foregoing record there is also transmitted the printed record, consisting of Volumes I and II, in the case of Philip B. Fleming, Administrator, Office of Temporary Controls, Appellant, vs. Munsingwear, Inc., No. 13991, which record is referred to at page 44 of the foregoing record and was submitted to said Court of Appeals at the hearing of these causes.

And I do further certify that on the 12th day of December, A. D. 1949, mandates were issued out of said Court of Appeals in said causes, directed to the Judges of the United States District Court for the District of Minnesota.

In testimony whereof, I hereunto subscribe my name and affix the Seal of the United States Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, on the 19th day of January, A. D. 1950.

[SEAL]

(S.) E. E. KOCH,  
Clerk of the United States Court of  
Appeals for the Eighth Circuit.

## SUPREME COURT OF THE UNITED STATES

No. —, October Term, 1949

UNITED STATES OF AMERICA

v.

MUNSINGWEAR, INC.

*Order extending time to file petition for writ of certiorari*

Upon consideration of the application of counsel for petitioner,  
It is ordered that the time for filing petition for writs of certiorari in the above-entitled cause be, and the same is hereby extended to and including March 22, 1950.

TOM C. CLARK,

*Associate Justice of the Supreme Court of the United States.*

Dated this 17th day of February 1950.



Supreme Court of the United States

No. 23, October Term, 1950

*Order allowing certiorari*

Filed April 24, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 24, October Term, 1950

*Order allowing certiorari*

Filed April 24, 1950

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

**In the Supreme Court of the United States**

OCTOBER TERM, 1949

Nos. 23, 24

UNITED STATES OF AMERICA, PETITIONER

v.

MUNSINGWEAR, INC.

PETITION FOR WRITS OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
EIGHTH CIRCUIT

ing March 22, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

#### QUESTION PRESENTED

Whether a judgment denying an injunction, the appeal from which has been dismissed as moot, can, despite the frustration of appellate review, stand as a bar to relitigation of the identical issue by the same parties but in a suit for damages.<sup>1</sup>

#### STATEMENT

On June 9, 1944, the Price Administrator, on behalf of the United States,<sup>2</sup> filed a complaint in two counts against respondent, alleging violations of Maximum Price Regulation No. 221. The first count prayed an injunction against alleged continuing violations and the second sought treble damages for violations alleged to have occurred in the previous year. (R. 1-6.) By agreement and pre-trial order, count two was held in abeyance pending the trial and final determination of the claim for an injunction (R. 21). On June 8, 1945, after the trial of this issue in May 1945 (see R. 80), the Price Administrator filed a second complaint

<sup>1</sup> The Government wishes to reserve a right to contend alternatively, should certiorari be granted, that the judgment of the Court of Appeals dismissing the appeal on the injunction count as moot can be reviewed in this proceeding and ordered amended by this Court so as to make clear, much as in *Gelpi v. Tuqwell*, 123 F. 2d 377 (C.A. 1), *infra*, pp. 5-6, that the district court adjudication shall not stand in the way of relitigation of the same issue in a different cause of action. Cf. *Hamilton Shoe Co. v. Wolf Brothers*, 240 U.S. 251, 257-259.

<sup>2</sup> The United States was ultimately substituted as plaintiff (R. 56).

in one count for treble damages for violations alleged to have occurred after June 8, 1944 (R. 44-46). This action was also held in abeyance pending decision in the injunction suit (see R. 80). The controversy in respect of all the claims concerned the proper pricing formula applicable to respondent's products under M. P. R. 221 (R. 28).

In October 1945, the District Court rendered an opinion holding that respondent's prices complied with the regulation (R. 28-36). Findings of fact, conclusions of law and judgment dismissing the complaint for injunction were filed in January 1946 (R. 36-42).

The Government appealed from this judgment to the Court of Appeals for the Eighth Circuit. While the appeal was pending, the commodity involved was decontrolled on November 12, 1946. Respondent thereafter moved to dismiss the appeal on the ground that the case had thereby been rendered moot (R. 70, 81). In June 1947, the Court of Appeals sustained this motion and dismissed the appeal for mootness (R. 81; 162 F. 2d 125).

On February 3, 1948, respondent moved in the District Court to dismiss the treble damage actions on the ground, *inter alia*, that the judgment of the District Court in the injunction suit, standing unreversed, barred the maintenance of these actions under the doctrine of *res judicata* (R. 64-67). On June 2, 1948, the District Court granted the motion and dismissed the treble damage actions (R. 52-56).

The United States appealed from these judgments of dismissal to the Court of Appeals for the Eighth Circuit. That court held, one judge dissenting, that the dismissal of the appeal in the injunction action for mootness did not affect the conclusiveness of the judgment appealed from in that case as a final adjudication of the issue upon which the judgment was based, and that that judgment constituted a bar to the treble damage actions. It therefore affirmed the judgments of the District Court (R. 90).

#### REASONS FOR GRANTING THE WRIT

1. The court below has announced a rule entirely out of harmony with settled legal principles in this field and, in so doing, has created a conflict among the circuits. As stated by the dissenting judge below (R. 87), "the only logical rule in a situation such as is here presented is that set out in" § 69 (2) of the American Law Institute's *Restatement of the Law of Judgments*:

Where a party to a judgment cannot obtain the decision of an appellate court because the matter determined against him is immaterial or moot, the judgment is not conclusive against him in a subsequent action on a different cause of action.

The rule thus stated by the *Restatement* has been followed and applied by the Court of Appeals for the Third Circuit in *Allegheny County v. Maryland Casualty Co.*, 146 F. 2d 633, 637, certiorari denied,



325 U. S. 855, to accomplish a result squarely in conflict with that reached by the court below.<sup>3</sup>

The same principle has been laid down by the First Circuit in *Gelpi v. Tugwell*, 123 F. 2d 377. In that case, the appellant alleged that she had been illegally removed from office and sought a writ of mandamus directing the Governor of Puerto Rico to reinstate her. Before decision of her appeal to the First Circuit from an adverse judgment of the Supreme Court of Puerto Rico, her term of office expired, with the result that the appeal was dismissed because the matter in dispute had become moot. In dismissing the appeal, the court stated (123 F. 2d at 378):

Since appellant, without fault on her part, is prevented from obtaining a review of the judgment below merely because, from intervening events, the appeal has become moot, that judgment will not become *res judicata* on the issues involved, in any subsequent litigation based upon a different cause of action. Appellant will be free to attack collaterally the executive order of removal, either in a suit for salary, or in an appropriate proceeding to test her eligibility to hold certain civil offices should she later aspire thereto.<sup>4</sup>

<sup>3</sup> The Third Circuit took the Restatement rule as "the general statement of the law", and applied it "in the absence of a specific decision on the exact point by the Pennsylvania Courts."

<sup>4</sup> Judge Magruder, dissenting in the *Gelpi* case, was of the opinion that the cause had not become moot. He agreed, however (123 F. 2d at 379),—

" . . . that if the appeal is to be dismissed on this ground it would be most unjust to leave the judgment below stand-

The majority below thought that, in view of this statement, the dismissal of the appeal in the *Gelpi* case was not "unconditional" (R. 83), and that that case is therefore distinguishable because there was no such reservation in the earlier opinion of the court below dismissing the Government's appeal in the injunction proceeding. But as the dissenting judge below pointed out, the statement in the *Gelpi* case, "that judgment [i. e., the judgment of the Supreme Court of Puerto Rico] will not become *res judicata* on the issues involved," etc., obviously meant that "the judgment necessarily, as a matter of law," was not *res judicata*, and that it could not be read as a mere direction to insert a reservation in the order of dismissal (R. 88). This is borne out by the court's mandate in the *Gelpi* case, which merely dismissed the appeal without qualification (see 123 F. 2d at 378).

Moreover, the opinion of the court below dismissing the earlier appeal as moot, after stating that the first "complaint separately stated two causes of action, one for the recovery of damages, and the other for an injunction", expressly noted that, pursuant to the agreement of the parties and the order of the District Court, the claim for damages was held in abeyance and no evidence in support of that claim was introduced, and, conse-

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ing as *res judicata*; and I think that the doctrine of *res judicata* is sufficiently flexible to avoid such a harsh result. Cf. *Blackman v. Stone*, 300 U.S. 641, 57 S. Ct. 514, 81 L. Ed. 856."

quently, "that at the close of the case as tried the only relief which plaintiff, if his contentions were sustained, was entitled to was a permanent injunction. On appeal therefore the injunction case only was brought to this court." 162 F. 2d at 127. It seems to us, as it did to the dissenting judge below, that by these observations the court made it clear that it was dealing only with the question of mootness of the suit for an injunction, and that "it viewed the treble damage rights as being protected by the agreement and order in the trial court and as therefore being unaffected in the circumstances by a refusal to hear the injunction appeal on its merits" (R. 89). In these circumstances, we do not think the disposition of the appeal in the injunction proceeding can fairly be read as an unqualified dismissal which left the District Court's judgment in full force and effect as a bar to adjudication of the distinct causes of action for damages. As the dissenting judge added, such a reading "seems to me an unnecessary refusal to give effect to the expressed intention and action of another division of this Court" (*ibid.*). And if the dissenting judge is correct in so stating, that is an additional ground for certiorari. *Dickinson v. Petroleum Conversion Corporation*, 338 U. S. 507, 508 ("Because of this intracircuit conflict, we made a limited grant.")

2. In its application of the principles of *res judicata*, characterized by the dissenting judge as

“literal and justice-thwarting restrictiveness” (R. 88), the court below is not in accord with principles approved by this Court in cases where appeals have been dismissed because of mootness. The majority below indicated (R. 86) that unless an appellate court, in denying review for mootness, modifies or vacates the judgment appealed from so as to protect the rights of other parties or other causes of action, a dismissal of the appeal leaves the judgment conclusive as to the matters litigated. While it is true that this Court has frequently reversed judgments in moot cases so as expressly to foreclose a plea of *res judicata* or estoppel by judgment (e. g., *Leader v. Apex Hosiery Co.*, 302 U. S. 656; *South Spring Hill Gold Mining Co. v. The Amador Medean Gold Mining Co.*, 145 U. S. 300; *United States v. Homburg-Amerikanische Co.*, 239 U. S. 466), it is not the invariable practice of this Court to reverse or modify the judgment below when dismissing an appeal because of mootness. *Chandler v. Wise*, 307 U. S. 474; *American Book Co. v. Kansas*, 193 U. S. 49; *Mills v. Green*, 159 U. S. 651; *Singer Manufacturing Company v. Wright*, 141 U. S. 696.

In the *Singer* case, the complainant sought to enjoin the collection of a Georgia tax on the ground that the law was invalid. Injunction was denied, but pending appeal to this Court, the taxes were paid under protest. This Court, in dismissing the appeal without qualification because of mootness,

indicated that the dismissal would not act as a bar in another action for restitution of the money paid. The Court said (p. 700):

If this enforced collection and protest were sufficient to preserve to the complainant the right to proceed for the restitution of the money, upon proof of the illegality of the taxes, such redress must be sought in an action of law. It does not continue in existence the equitable remedy by injunction which was sought in the present suit. The equitable ground for relief prayed ceased with the payment of taxes.

The appeal must therefore be dismissed; and it is so ordered.

Professor Scott, in his *Collateral Estoppel by Judgment*, (1942) 56 Harv. L. Rev. 1, 15-16, states:

A judgment rendered by the trial court may not be conclusive by way of collateral estoppel because the unsuccessful party cannot obtain the decision of the appellate court upon the matter decided adversely to him. The fact that a party who might have appealed fails to do so is immaterial; but the fact that he is unable to appeal is of importance.

As an illustration of this principle, Professor Scott refers to the situation where an appeal is denied because the controversy has become moot, concluding that although the judgment itself may stand, the matters decided are not conclusive by way of collateral estoppel in a subsequent controversy



between the parties involving a different cause of action.<sup>5</sup>

3. The effect of the decision below is to deny to the Government a right to appeal conferred by Act of Congress. See 50 U. S. C. App. (Supp. II) 925 (e) and 28 U. S. C. 1291. The court below's dismissal of the appeal from the denial of the injunction, although for seemingly good and sufficient reason, did in fact leave the district court's judgment unreviewed. While this is unobjectionable, the picture changes entirely when that unreviewed district court judgment is held to be conclusive in another suit between the same parties on a different cause of action. For then the unsuccessful party in the trial court, here the Government, is, through no fault of its own, denied the appellate review for which statutory provision has been made.

The crucial distinction between the case at bar and *Johnson Co. v. Wharton*, 152 U. S. 252, relied upon by the court below (R. 85), is the presence here, and the absence there, of a statutory right to an appeal. In the *Wharton* case, a circuit court decision was held to be no less effective as a prior adjudication binding in a second action by reason of the fact that the first judgment could not be reviewed by this Court because the amount involved was so small as not to entitle the defendant to a writ of error. To hold, in the *Wharton* case, that the

<sup>5</sup> It may be noted that Professor Scott's article and §§ 68, 69, and 70 of the Restatement were cited as authoritative in this field in *Commissioner v. Surnen*, 333 U.S. 591, 598.

unreviewed trial court decision bound the parties in a subsequent suit, was entirely consistent with the scheme of appellate jurisdiction prescribed by Congress; to follow that ruling here is to ignore the Congressional provision for appeals from district court decisions.

4. The court below was not insensitive to the confusion injected into the law by its decision. It said (R. 86-87):

While the question is not before us on this appeal, one reasonably can believe that where a judgment determines a vital issue which controls, or will substantially affect, other pending litigation between the parties, an appeal from the judgment should not be dismissed for mootness merely because the relief prayed for by the plaintiff is no longer available. We think this is particularly true where the correctness of the determination of the issue by the trial court, rather than the relief sought, is the real matter in controversy between the parties. If dismissals of appeals for mootness are to be held to impair the conclusiveness of the judgments appealed from, it would seem advisable for the appellate courts to re-examine their standards for determining under what circumstances a case may be dismissed as moot.

The court below fell into error, however, in finding itself powerless to avoid the injustice to which it adverted. This Court can and should remedy the situation created by the court below in accord with

its admonition that where a case is considered moot but other matters in controversy are affected by the judgment appealed from, an appellate court should proceed in a manner deemed "most consonant to justice." *United States v. Hamburg-Amerikanische Co.*, 239 U. S. 466, 478; *Heitmuller v. Stokes*, 256 U. S. 359, 362-363; *Brownlow v. Schwartz*, 261 U. S. 216, 218; *Walling v. Reuter Co.*, 321 U. S. 671, 677.<sup>6</sup>

#### CONCLUSION

For the foregoing reasons, this petition for writs of certiorari should be granted.

Respectfully submitted,

PHILIP B. PERLMAN,  
*Solicitor General.*

MARCH, 1950.

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<sup>6</sup> *Walling v. Reuter Co.*, 321 U.S. 671, raised a similar, but nevertheless distinct, problem from that involved in the case at bar. There, upon dissolution of the corporate defendant while the case was pending in this Court, the judgment directed the vacation of the Court of Appeals' reversal leaving in effect the district court judgment against the defendant. The reason for this result was that the case had not become moot because the judgment that had been entered ran not only against the dissolved defendant but also "agents, servants, employees and attorneys, and all persons acting or claiming to act in its behalf or interest." 321 U.S. at 672. With respect to its effect on such other persons, the trial court judgment was allowed to stand though subject to "appropriate appellate review" on their behalf. 321 U.S. at 678. There was no denial of an appeal to Reuter Co., as we contend there was in this case, since Reuter Co. could not longer be affected by the judgment and, hence, would have no appealable interest.

# **In the Supreme Court of the United States**

OCTOBER TERM, 1950

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Nos. 23, 24

UNITED STATES OF AMERICA, PETITIONER

v.

MUNSINGWEAR, INC.

---

ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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BRIEF FOR THE UNITED STATES

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# ***In the Supreme Court of the United States***

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*v.*

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*ON WRITS OF CERTIORARI TO THE UNITED STATES  
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---

**BRIEF FOR THE UNITED STATES**

---

## **OPINIONS BELOW**

The majority and dissenting opinions of the Court of Appeals for the Eighth Circuit (R. 79-89) are reported at 178 F. 2d 204.

## **JURISDICTION**

The judgments of the court of appeals were entered on November 22, 1949 (R. 90). By order of Mr. Justice Clark, dated February 17, 1950, the time within which a petition for writs of certiorari might be filed was extended to and including March 22, 1950 (R. 92). The petition for writs of

certiorari was filed on March 4, 1950, and was granted on April 24, 1950 (R. 93, 339 U. S. 941). The jurisdiction of this Court rests upon 28 U. S. C. 1254(1).

#### QUESTION PRESENTED

Whether a judgment denying an injunction, the appeal from which has been dismissed as moot, can, despite the frustration of appellate review, stand as a bar to relitigation of the identical issues by the same parties in a suit for damages.

#### STATEMENT

On June 9, 1944, the Price Administrator, on behalf of the United States,<sup>1</sup> filed a complaint in two counts against respondent, alleging violations of Maximum Price Regulation No. 221. The first count prayed an injunction against alleged continuing violations and the second sought treble damages for violations alleged to have occurred in the previous year (R. 1-6). By agreement and pre-trial order, count two was held in abeyance pending the trial and final determination of the claim for an injunction (R. 21). On June 8, 1945, after the trial of this count in May 1945 (see R. 80), the Price Administrator filed a second complaint in one count for treble damages for violations alleged to have occurred after June 8, 1944 (R. 44-46). This action was also held in abeyance pending decision in the injunction suit (see R. 80). The controversy in respect of all the claims concerned the

<sup>1</sup>The United States was ultimately substituted as party plaintiff (R. 56).

proper pricing formula applicable to respondent's products under M. P. R. 221 (R. 28).

In October 1945, the district court rendered an opinion holding that respondent's prices complied with the regulation (R. 28-36). Findings of fact, conclusions of law and judgment dismissing the complaint for injunction were filed in January 1946 (R. 36-42).

The Government appealed from this judgment to the Court of Appeals for the Eighth Circuit. While the appeal was pending, the commodity involved was decontrolled on November 12, 1946. Respondent thereafter moved to dismiss the appeal on the ground that the case had thereby been rendered moot (R. 70, 81). In June 1947, the court of appeals sustained this motion and dismissed the appeal for mootness (R. 81; 162 F. 2d 125).

On February 3, 1948, respondent moved in the district court to dismiss the treble damage actions on the ground, *inter alia*, that the judgment of the district court in the injunction suit, standing unreversed, barred the maintenance of these actions under the doctrine of *res judicata* (R. 64-67). On June 2, 1948, the district court granted the motion and dismissed the treble damage actions (R. 52-56).

The United States appealed from these judgments of dismissal to the Court of Appeals for the Eighth Circuit. That court held that the dismissal of the appeal in the injunction action for mootness



did not affect the conclusiveness of the judgment appealed from in that case as a final adjudication of the issue upon which the judgment was based, and that that judgment constituted a bar to the treble damage actions (R. 79-87). It, therefore, affirmed the judgments of the district court (R. 90). Judge Johnsen dissented on three separate grounds (R. 87-89): (1) the only logical and fair rule is that the district court judgment, the appeal from which was dismissed as moot, does not prevent relitigation; (2) the court, in dismissing the appeal taken from the denial of the injunction, did not intend to affect the treble damage actions; and (3) the respondent, having procured dismissal of the first appeal as moot, is estopped from asserting that the dismissal did in fact adjudicate issues which were not moot.

#### SUMMARY OF ARGUMENT

A. The approach taken by the majority of the court below, predicated on the erroneous assumption that the doctrine of *res judicata* is a technical rule to be applied mechanically in all cases in which there is compliance with its generally stated requirements, is one of "literal and justice-thwarting restrictiveness" (R. 88). It is not required by the decisions of this Court, which, until this time, has never had occasion to pass upon the specific question. And the general formulation of *res judicata* set out in this Court's decisions dealing with other situations is inapplicable here.

The economy of judicial time and certainty of legal relations sought to be advanced by application of the doctrine of *res judicata* must be balanced against the limitation, inherent in the doctrine, that injustice must be avoided. On balance, the only logical and fair rule that emerges for a situation such as is here involved is that the unreviewed trial court judgment is not to be treated as a bar to relitigation of the same issues in a different cause of action. *Restatement of the Law of Judgments*, Section 69(2). The well-established practice of this Court in disposing of moot cases demonstrates very cogently that in such situations justice requires that the way be left open to relitigation of the same issues determined by the trial court but mooted on appeal even if the result may sometimes be to require a greater expenditure of time. Similarly, the requirement that the result be just overrides public policy favoring certainty in legal relationships. Indeed, as a practical matter, that policy plays little, if any, part in such proceedings, for since the case is moot, the trial court's judgment resolves no actual controversy and is hardly more than a piece of paper. To hold such a judgment not to be *res judicata* would not only be just but would also further sound judicial administration.

B. Under the decision of the court below, the Government, through no fault of its own, has been denied an appellate consideration of its case in the face of the statutory provision for appeals from

final district court judgments. This Court's ruling, in *Johnson Co. v. Wharton*, 152 U. S. 252, that the doctrine of *res judicata* bars re litigation even when the prior judgment which is invoked as a bar could not be appealed, is plainly distinguishable. For, in that case, the reason why no appeal could be taken from the first judgment was that Congress had provided none; here, on the other hand, there is a statutory right to appeal, and its temporary frustration, by reason of the injunction suit having been rendered moot, should not be made permanent to bar review of a live controversy. Such a result would not be consonant with justice.

C. 1. There is no warrant for limiting the right to relitigate to a case in which the court, faced with the moot appeal, had reserved that right, either in its opinion or by reversing or vacating the judgment, the appeal from which has been rendered moot. If such a reservation were generally deemed essential to the right to relitigate, one would expect to find most courts reserving that right since, in most, if not all, situations, that is a course most consonant with justice. But that has not been the case, apparently because courts have not generally considered such a reservation crucial. Though this Court's general practice is to eliminate the judgment below when an appeal has been rendered moot, it has also dismissed moot appeals without more in circumstances which clearly indicated that the unreversed judgment was not to be *res judicata*.

Moreover, the Court's sole reason for adopting the practice of eliminating the judgment is not that the judgment if left standing would in fact be *res judicata* but rather to destroy any possibility of such a contention. Finally, the practice of the courts of appeals is completely lacking in uniformity; most of these courts do not follow this Court's practice and a substantial number dispose of moot appeals merely by dismissing the appeal.

2. Even though the appeal from the judgment denying the injunction in this case was unconditionally dismissed as moot, the opinion of the court which dismissed the appeal manifests an intention that that dismissal was not to operate as *res judicata*. The court's repeated reference to the separateness of the injunction and the treble damage actions and to the fact that the latter had been held in abeyance, makes it clear that the court considered itself as dealing only with the question of mootness of the injunction suit and that it regarded the treble damage suits as unaffected by its refusal to hear the injunction appeal on the merits.

## ARGUMENT

**The Government's Statutory Right to Appeal from the Denial of the Injunction Having Been Frustrated Through No Fault of Its Own, the Trial Court's Unreviewed Judgment Does Not Bar Relitigation of the Same Issues in the Treble Damage Actions**

*A. Inherent in the Doctrine of Res Judicata Is the Principle That a Prior Adjudication Is Not to Be Deemed a Bar to Relitigation When, as Here, the Injustice Which Would Follow Upon Application of the Doctrine Outweighs the Reasons for Its Invocation.*

The court below has held that although the Government's appeal in the injunction suit was dismissed as moot, the trial court's finding in the injunction proceeding, that respondent had not violated M. P. R. 221, stands as a bar to relitigation of the same issues in the treble damage actions. According to the court below, since the mandate in the injunction suit was to dismiss the appeal without more, the judgment of the district court was left standing as a final judgment, and, therefore, under the doctrine of *res judicata*, that judgment precludes relitigation in a second proceeding between the parties of any of the issues litigated in the first proceeding.

This holding, we believe, is predicated on the assumption that the doctrine of *res judicata* is a technical rule,<sup>2</sup> to be applied mechanically in all cases in which there is compliance with its requirements

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<sup>2</sup> As a matter of nomenclature, that phase of the doctrine of *res judicata* which is called "collateral estoppel by judgment" is a more accurate description of the rule invoked in



as they are generally stated. On that assumption, the court below felt itself unable, in this proceeding, to deal with the injustice inherent in its disposition of the case, and which it readily recognized (R. 86-87):

While the question is not before us on this appeal, one reasonably can believe that where a judgment determines a vital issue which controls, or will substantially affect, other pending litigation between the parties, an appeal from the judgment should not be dismissed for mootness merely because the relief prayed for by the plaintiff is no longer available. We think this is particularly true where the correctness of the determination of the issue by the trial court, rather than the relief sought, is the real matter in controversy between the parties. If dismissals of appeals for mootness are to be held to impair the conclusiveness of the judgments appealed from, it would seem advisable for the appellate courts to re-examine their standards for determining under what circumstances a case may be dismissed as moot.

Nevertheless, the court below read this Court's opinions, typified by *Southern Pacific R. Co. v. United States*, 168 U. S. 1, 48-49, as rendering it powerless to avoid injustice in this proceeding and expressed itself as "satisfied that neither the District Court nor this Court would be justified in

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this case since the treble damage suits are different causes of actions from the injunction suit. *Commissioner v. Sunnen*, 333 U.S. 591, 597-598. •

altering the doctrine of *res judicata* as it has thus far been enunciated by the Supreme Court" (R. 87).

But such an approach to the doctrine of *res judicata*, which the dissenting judge below characterized as being of "literal and justice-thwarting restrictiveness" (R. 88), is not required by the decisions of this Court. As the dissenting judge points out, this Court has, until this time, never had the occasion to pass upon the specific question here involved (R. 88). Neither the *Southern Pacific* case nor any of the numerous other decisions of this Court discussing *res judicata* or collateral estoppel by judgment deal with the situation presented by the case at bar.

Consequently, the court below erred in assuming that the general formulation of *res judicata* set out in these cases, although never "modified, conditioned or overruled by [this] Court" (R. 85), must be applied here. No extended citation of cases is, of course, necessary to demonstrate that general principles of law such as that of *res judicata* are not absolutes to be applied in all situations where their formal requirements are literally complied with, but rather, are limited rules, circumscribed in scope by the purposes for which they were established. *Mercoind Corp. v. Mid-Continent Co.*, 320 U. S. 661, 670. "Such a rule of public policy must be watched in its application lest a blind adherence to it tend to defeat the even firmer established policy of giving every litigant a full and fair day

in court.” *United States v. Silliman*, 167 F. 2d 607 (C.A. 3), certiorari denied, 335 U. S. 825. Cf. *Misir Raghobardial v. Rajah Sheo Baksh Singh*, L. R., 9 Indian Appeals 197 (Privy Council, 1882). Clearly, therefore, the court below, instead of blindly holding the present cases to be governed by *res judicata* on the basis of particular verbal formulations of the doctrine addressed to different situations, should have considered the question in the light of the reasons for the rule.

When the present cases are so considered, the doctrine of *res judicata* does not, we submit, require the result reached below. In determining whether the doctrine is applicable, “it is first necessary to understand something of the recognized meaning and scope of *res judicata*, a doctrine judicial in origin. The general rule of *res judicata* applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations.” *Commissioner v. Sunnen*, 333 U. S. 591, 597. The doctrine is, however, limited by the requirement that the result reached must be that most consonant with justice. “\* \* \* [C]ollateral estoppel must be used with its limitations carefully in mind so as to avoid injustice” \* \* \*. *Commissioner v. Sunnen*, *supra*, at 599; see also *United States v. Stone & Downer Co.*, 274 U. S. 225, 235-236; *Mercoid Corp. v. Mid-Continent Co.*, 320 U. S. 661, 670; *Jordahl v. Berrý*, 72 Minn. 119,

122;<sup>3</sup> cf. *South Spring Gold Co. v. Amador Gold Co.*, 145 U. S. 300, 302; *United States v. Hamburg-Amerikanische Co.*, 239 U. S. 466, 478; *Heitmuller v. Stokes*, 256 U. S. 359, 362-363; *Brownlow v. Schwartz*, 261 U. S. 216, 218; *Walling v. Reuter Co.*, 321 U. S. 671, 676-677.

In *United States v. Stone & Downer Co.*, *supra*, this Court approved the practice of the then Court of Custom Appeals of not applying collateral estoppel by judgment in respect to subsequent importations, even though they involved the same issue of fact and the same question of law, because to apply the doctrine

\* \* \* would lead to inequality in the administration of the customs law, to discrimination and to great injustice and confusion. \* \* \* if the first decision were against a large importing house, and its competitors instituted subsequent litigation on the

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<sup>3</sup> The Supreme Court of Minnesota, the decisions of which respondent claims should be regarded as persuasive since the judgment here involved was issued by a Federal District Court sitting in Minnesota (Br. in Opp., p. 14), has stated in regard to the applicability of *res judicata* (*Jordahl v. Berry*, 72 Minn. 119, 122):

\* \* \* we feel at liberty to adopt whichever rule (permissible on principle) we think the safest, most convenient and equitable in practice; keeping in mind that it is more important to work practical justice than to preserve the logical symmetry of a rule, provided this can be done without destroying all rules, and leaving the law on the subject all at sea.

Respondent has not cited, nor have we found, any Minnesota cases dealing with the question here involved, although the Minnesota courts generally announce the same formulation of the doctrine of *res judicata* as that set out in *Southern Pacific R. Co. v. United States*, 168 U. S. 1, 48-49.

same issues, with new evidence or without it, and succeeded in securing a different conclusion, the first litigant, bound by the judgment against it in favor of the Government, must permanently do business in importations of the same merchandise at great and inequitable disadvantage with its competitors. [274 U. S. at 236].

That considerations of justice and fairness are limitations on the doctrine of collateral estoppel is, we think, the basis of the statement of the dissenting judge below that "the only logical rule in a situation such as is here presented is that set out in" Section 69(2) of the American Law Institute's *Restatement of the Law of Judgments*:

Where a party to a judgment cannot obtain the decision of an appellate court because the matter determined against him is immaterial or moot, the judgment is not conclusive against him in a subsequent action on a different cause of action.

Paragraph (d) of the Comments to Section 69 elaborates upon this statement:

*d. Where a matter has become moot.*  
Where a judgment has been rendered against a party by a court of first instance, and on his appeal the appellate court refuses to review the proceedings because the controversy has become moot, the judgment is not binding in a subsequent action between the parties based upon a different cause of action.



Professor Scott in his *Collateral Estoppel by Judgment* (1942), 56 Harv. L. Rev. 1, 15-16, has taken the same view:

A judgment rendered by the trial court may not be conclusive by way of collateral estoppel because the unsuccessful party cannot obtain the decision of the appellate court upon the matter decided adversely to him. The fact that a party who might have appealed fails to do so is immaterial; but the fact that he is unable to appeal is of importance.

As an illustration of this principle, Professor Scott refers to the situation where an appeal is denied because the controversy has become moot, concluding that although the judgment itself may stand, the matters decided are not conclusive by way of collateral estoppel in a subsequent controversy between the parties involving a different cause of action. 56 Harv. L. Rev. at 16.<sup>4</sup>

The Court of Appeals for the First Circuit has applied this principle in *Gelpi v. Tugwell*, 123 F. 2d 377, where the appellant was seeking a writ of mandamus directing the Governor of Puerto Rico to reinstate her in the office from which she claimed she had been illegally removed. Before decision of her appeal to the First Circuit from an adverse judgment of the Supreme Court of Puerto Rico,

<sup>4</sup> It is to be noted that Professor Scott's article and sections 68, 69, and 70 of the *Restatement* were cited as authoritative in this field in *Commissioner v. Sunnen*, 333 U. S. 591, 598. See also *Mercoid Corp. v. Mid-Continent Co.*, 320 U. S. 681, 671.

her term of office expired, with the result that the appeal was dismissed because the majority of that court concluded that the matter in dispute had become moot. In dismissing the appeal without more, the court noted (123 F. 2d at 378):

Since appellant, without fault on her part, is prevented from obtaining a review of the judgment below merely because, from intervening events, the appeal has become moot, that judgment will not become *res judicata* on the issues involved, in any subsequent litigation based upon a different cause of action. Appellant will be free to attack collaterally the executive order of removal, either in a ~~suit~~ for salary, or in an appropriate proceeding to test her eligibility to hold certain civil offices should she later aspire thereto.

Judge Magruder dissented from the majority's holding because, in his view, although the relief prayed could not be granted, the decision on the basic legal questions was still necessary to settle appellant's rights to recover salary and her eligibility to hold certain other offices. He agreed, however, with the majority (123 F. 2d at 379):

\* \* \* that if the appeal is to be dismissed on this ground [of mootness] it would be most unjust to leave the judgment below standing as *res judicata*; and I think that the doctrine of *res judicata* is sufficiently flexible to avoid such a harsh result.

The Court of Appeals for the Third Circuit has also followed and applied the *Restatement* rule in *Allegheny County v. Maryland Casualty Co.*, 146 F. 2d 633, 637, certiorari denied, 325 U. S. 855, to accomplish a result squarely in conflict with that reached by the court below. Although that case was governed by local Pennsylvania law, the Third Circuit accepted the *Restatement* rule as "the general statement of the law," and on that basis, assumed the right to apply it as Pennsylvania law "in the absence of a specific decision on the exact point by the Pennsylvania Courts." See also, *Leader v. Apex Hosiery Co.*, 108 F. 2d 71, 81 (C. A. 3), affirmed, 310 U. S. 469; *Knowlton v. Town of Swampscott*, 280 Mass. 69; *Rawlings v. Claggett*, 174 Miss. 845; Note, *Res Judicata Effects of Dismissing an Appeal as Moot* (1950), 50 Col. L. Rev. 716; Annotation, 157 ALR 1038, 1043-1045.<sup>6</sup>

<sup>5</sup> The opinion in *Rawlings v. Claggett*, 174 Miss. 845, 847-848, reads:

The appeal in this case is dismissed. It presents only moot questions.

But the dismissal of this appeal will not prejudice the rights of the parties in other suits, and is not to be taken as *res adjudicata*.

Appeal dismissed.

<sup>6</sup> Respondent cites a group of cases involving review of administrative refusals to renew the annual permits required under the federal prohibition act as holding to the contrary (Br. in Opp., p. 5). The decisions in *Wynne v. Harrison Beverage Co.*, 60 F. 2d 483 (C. A. 3); *Rahayei v. McCampbell*, 55 F. 2d 221, 222 (C. A. 2) and *Wynne v. Union City Brewing Co.*, 60 F. 2d 479 (C. A. 3), all rest on the authority of *Interboro Beverage Corp. v. Doran*, 52 F. 2d 35 (C. A. 2). In the latter case, the court of appeals heard and disposed of both appeals at the same time and the district judge in the second case had considered the entire matter without regard to the

The *Restatement* rule as applied in the *Gelpi* and *Allegheny County* cases reflects the view that in cases which have become moot pending appeal, the reasons for *res judicata*, i.e., economy of judicial time and public policy in favor of certainty in legal relations, are overridden by the requirements of justice. It is the well-established practice of this Court, in disposing of moot cases, not merely to dismiss the appeal for mootness but, in addition, to direct the vacation of the judgment below and the dismissal of the complaint specifically in order to make certain that the way is left open for full relitigation of the same issues in any subsequent proceeding which might be instituted between the same parties. See, e.g., *United States v. Hamburg-Amerikanische Co.*, 239 U. S. 466, 478; *Brownlow v. Schwartz*, 261 U. S. 216; *South Spring Gold Co. v. Amador Gold Co.*, 145 U. S. 300; *Berry v. Davis*, 242 U. S. 468; *Commercial Cable Co. v. Burleson*, 250 U. S. 360; *Heitmuller v. Stokes*, 256 U. S. 359, 363; *Atherton*

prior adjudication (52 F. 2d at 36). Thus, while the court of appeals stated that estoppel by judgment was applicable, the judgment it affirmed was not so predicated, and it regarded as persuasive the fact that both district courts on the basis of substantially the same evidence had arrived at the same conclusion. To the extent that these cases do hold that the judgment left unreversed upon the dismissal of the moot appeal is *res judicata*, we believe that we have demonstrated in the text the error of that holding. The courts in those cases, as the court below here, mechanically applied *res judicata* as a technical doctrine, treating considerations of justice as irrelevant. This is manifest from *Rahayel v. McCampbell*, *supra*, where the court indicated that it regarded itself as powerless to mitigate the hardship which it recognized would be caused by its disposition of the case. See 55 F. 2d at 222.

*Mills v. Johnston*, 259 U. S. 13, 16; *Alejádrino v. Quezon*, 271 U. S. 528; *United States ex rel. Norwegian Nitrogen Products Co. v. U. S. Tariff Commission*, 274 U. S. 106, 112; *United States v. Anchor Coal Co.*, 279 U. S. 812; *Blackman v. Stone*, 300 U. S. 641; *Leader v. Apex Hosiery Co.*, 302 U. S. 656; *SEC v. Long Island Lighting Co.*, 325 U. S. 833; *Hodge v. Tulsa County Election Board*, 335 U. S. 889. And see *infra*, pp. 30-36.

This practice demonstrates very cogently that in such situations the needs of justice overbear the interest in economy of judicial time which is one of the reasons for the *res judicata* rule.<sup>7</sup> For example, in *United States v. Hamburg-Amerikanische Co.*, *supra*, the appeal of the Government in an anti-trust proceeding ~~against certain shipping~~ companies had become moot by virtue of the outbreak of World War I. In considering how to dispose of the case in view of "the possibility or probability that on the cessation of war the parties will resume or recreate their asserted illegal combination" (239 U. S. at 475), the Court ruled that (239 U. S. at 478):

\* \* \* the ends of justice exact that the judgment below should not be permitted to stand when without any fault of the Government there is no power to review it upon the merits, but that it should be reversed and the

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<sup>7</sup> The existence of this practice is particularly persuasive here since in many of the above-cited cases, appellate review, albeit by an intermediate court, had already been had whereas here none at all has been accorded.



case be remanded to the court below with directions to dismiss the bill without prejudice to the right of the Government in the future to assail any actual contract or combination deemed to offend against the Anti-Trust Act.

And in *Blackman v. Stone*, 300 U. S. 641, where apparently the suit had become moot so far as relief by injunction was sought, this Court dismissed the direct appeal from a three judge district court "but without prejudice to action by the District Court in relation to any matter which may remain in the case."

The desirability that the result be that "most consonant with justice" similarly, we submit, overrides the public policy in favor of certainty in legal relations to the extent that that policy plays any part in proceedings where the controversy has become moot pending appeal. In those situations there is, by definition, no longer any actual controversy for the appellate court to consider, and hence none of the issues between the parties involved in the mooted controversy can be resolved. The judgment below, therefore, is hardly more than a mere piece of paper, recording the lower court's views and entitled to no greater weight than a judgment from which an appeal is pending, which judgment, the court below stated (R. 86), has no conclusive effect. In these circumstances, the policy in favor of certainty in legal relations has little, if any, applicability, and elimination of the district court

judgment is at best a desirable, but certainly not a critical, formality. See *infra*, pp. 28-36.

Moreover, it would seem to be proper in the interest not only of fairness but of sound judicial administration that the issues involved in the mooted controversy be open to relitigation if a justiciable controversy exists or should subsequently arise between the same parties. Otherwise, courts would be faced with the exacting task of determining whether, despite the unavailability of the requested relief, a justiciable controversy remained which would make a plea of mootness unavailing. Cf. *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227. But if it were clear that the dismissal of an appeal for mootness would not bar relitigation of the same issues in a subsequent proceeding, courts would not be under pressure to restrict the concept of mootness in situations, such as that here involved, where although the affirmative relief requested cannot be granted, other forms of relief, requiring resolution of many of the same issues, are still available. Yet these pressures, easily avoidable, are the basis (1) of the suggestion of the court below that it might be advisable to re-examine the standard for determining mootness (R. 86-87) and (2) of the position taken by Judge Magruder in *Gelpi v. Tugwell*, 123 F. 2d 377, 378-379 (C.A.1) (*supra*, pp. 14-15). The same pressures have also led to rulings by several of the state courts that in such situations the pending appeal had not become moot (see *Moore v. Smith*, 160 Kan. 167, 170-

175 and cases there cited).<sup>8</sup> We submit, accordingly, that the courts should not be placed in a position where they must either adjudicate issues which are academic as far as the pending proceeding is concerned and indulge in the undesirable practice of resolving controversies without a concrete setting, or, in the alternative, perpetuate an injustice by denying to an appellant who is guilty of no fault, not only of his initial opportunity to secure appellate review but of all appellate review. Cf. *Walling v. Reuter Co.*, 321 U. S. 671.

Finally, refusal to permit the unreversed judgment to stand as a bar to relitigation will not, as respondent urges (Br. in Opp., p. 13), result in confusion. There are numerous exceptions to, and limitations on, the doctrine of *res judicata*. *Supra*, pp. 10-11. See, e.g., *Commissioner v. Sunnen*, 333 U. S. 591, 599-602; *Angel v. Bullington*, 330 U. S. 183, 203 (Mr. Justice Rutledge, dissenting); *Mercoind Corp. v. Mid-Continent Co.*, 320 U. S. 661, 670. In addition, the principal issue raised in the subsequent proceedings where such a judgment is claimed to be *res judicata* is whether an appeal was properly taken and dismissed as moot without fault on the

<sup>8</sup> It is interesting to note that in *Moore v. Smith*, *supra*, the Kansas Supreme Court took pains to note (160 Kan. at 171):

In a great number of cases, early and recent, this court had dismissed appeals because the issues had become moot. Every one of these many decisions which we have been able to locate has been carefully examined, along with textbook discussions and many cases from foreign jurisdictions. Among all of our own decisions we find very few where it could at all be contended that dismissal adversely affected any rights vital to the parties.

part of the appellant. The difficulties raised, and the time consumed, in resolving that question are *de minimis* compared to the difficulties and time frequently involved in passing on other problems relating to the applicability of collateral estoppel by judgment. Cf. Griswold, *Res Judicata in Federal Tax Cases* (1937), 46 Yale L.J. 1320, 1355.<sup>9</sup>

*B. The Effect of the Decision Below Is to Deny an Appeal in a Case in Which Congress Intended Appellate Review to Be Available.*

The statutes bearing on a situation are highly relevant factors in determining where justice lies in a particular case. Hence, it is significant that the effect of the dismissal for mootness in the instant cases has been that the unsuccessful party in the trial court, here the Government, has been denied that appellate review which Congress has conferred as a matter of statutory right. See 50 U.S.C. App., Supp. III, 925(e) and 28 U.S.C. 1291. Here, the dismissal of the appeal from the denial of the injunction, although for seemingly good and sufficient reason, did in fact leave the district court's judgment unreviewed. While this is unobjectionable, the picture changes entirely when that unreviewed district court judgment is held to be conclusive in another suit between the same parties on a different cause of action, for then the Government is, through no fault of its

<sup>9</sup>Our examination of the cases shows, perhaps, that there are some circumstances in which litigation over the question whether *res judicata* is applicable or not, may well present more difficult questions than would be involved in re-examining the merits of the case itself." (46 Yale L. J. at 1355).

own denied the appellate review for which statutory provision has been made.

The crucial distinction between the case at bar and *Johnson Co. v. Wharton*, 152 U.S. 252, relied upon by the court below (R. 85), is the presence here, and the absence there, of a statutory right to an appeal. There had been no right to review of the judgment which was invoked in the *Wharton* case as a bar, since the amount involved was so small as not to entitle the defendant to a writ of error under the applicable statutory provisions. The Court held that this first, circuit court, decision, although not reviewable by this Court, was nevertheless effective as a prior adjudication binding in the second action. This result is entirely consistent with the scheme of appellate review then prescribed by Congress, which reflected the view that where the amount involved is small, the desirability of conserving judicial time outweighs whatever injustice might result from a decision of the trial court, however erroneous. On the other hand, by conferring a right of appeal in situations such as that presented by the instant cases, Congress indicated that in such cases the desirability of correctly resolving the controversy between the parties justified the expenditure by the judiciary of the additional time involved in appellate review. To apply the *Wharton* ruling in the instant cases is, therefore, to ignore this congressional provision for appeals from district court decisions. See Note, *Res Judicata Effects*



*of Dismissing an Appeal as Moot* (1950), 50 Col. L. Rev. 716, 718.

Moreover, in the *Wharton* case, the Court noted that "whatever mischiefs or injustice may result from such a condition of things, must be remedied by legislation regulating the jurisdiction of the courts \* \* \*" (152 U. S. at 261). Shortly prior to this decision, Congress, by the Act of March 3, 1891 (26 Stat. 826), provided for appeals from all final trial court judgments irrespective of the amount involved. See *The Paquete Habana*, 175 U. S. 677, 681; *Kirby v. American Soda Fountain Company*, 194 U. S. 141, 144. This change removed the possibility of the situation presented in the *Wharton* case again arising and hence no similar issue has since been presented to this Court.

• In addition, there is no merit in respondent's suggestion (Br. in Opp., p. 7) that it should make no difference whether appeal is unavailable because Congress has not provided one, or whether appeal is not to be had because Article III of the Constitution forbids judicial consideration of moot cases. In the first place, the congressional provision for finality of trial court judgments which then barred review in the *Wharton* situation reflected a congressional conclusion that in the class of cases in which no review is provided none is desirable. See *supra*, p. 23. But the Article III ban on consideration of moot cases reflects no

such policy determination. To accord review when the controversy ceases to be moot comports with the statute providing for review and is not inconsistent with Article III.<sup>10</sup> Secondly, as has already been suggested, a trial court judgment, the appeal from which is dismissed because of mootness, is merely a paper judgment which, because the controversy has been mooted, does not, by definition, resolve any issues or fix any legal rights of the parties thereto. On the other hand, where there is a live controversy, the fact that appeal is denied by statute does not affect the validity or effectiveness of the judgment. It remains a living document whose main purpose is to resolve an actual controversy between the parties and to fix their legal rights in the premises. That controversy having been resolved, the doctrine of *res judicata* precludes relitigation; but where nothing has previously been settled because the issue

<sup>10</sup> *Walling v. Reuter Co.*, 321 U.S. 671, raised a similar, but nevertheless distinct, problem from that involved in the case at bar. There, upon dissolution of the corporate defendant while the case was pending in this Court, the judgment directed the vacation of the court of appeals' reversal leaving in effect the district court judgment against the defendant. The reason for this result was that the case had not become moot because the judgment that had been entered ran not only against the dissolved defendant but also "agents, servants, employees and attorneys, and all persons acting or claiming to act in its behalf or interest." 321 U.S. at 672. With respect to its effect on such other persons, the trial court judgment was allowed to stand though subject to "appropriate appellate review" on their behalf. 321 U.S. at 678. There was no denial of an appeal to Reuter Co., as we contend there was in this case, since Reuter Co. could no longer be affected by the judgment, and, hence, would have no appealable interest.

became moot, the unsuccessful party in the new suit is entitled to that appellate review on the merits for which Congress has made provision.

The situations presented in cases such as *Wilson's Executor v. Deen*, 121 U.S. 525, and *Hubbell v. United States*, 171 U.S. 203, where although appeal was allowed, it was not taken, or if taken was not perfected, are likewise distinguishable from the situation here (Cf. R. 86). In those cases, the failure to obtain the appellate review provided by Congress was the result of the appellant's own fault in not noting an appeal, or, if noted, in failing to fulfill the requirements prescribed for perfecting the appeal.<sup>11</sup> Here, however, although respondents claimed in the appeal in the injunction suit that the Government as appellant had failed to satisfy the requirements of the court of appeals (See Br. in Opp., p. 13), that claim was passed over (162 F. 2d at 127, R. 81),<sup>12</sup> and the case was dismissed as moot

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<sup>11</sup> Professor Scott in his *Collateral Estoppel by Judgment* (1942) 56 Harv. L. Rev. 1, 15-16, states:

A judgment rendered by the trial court may not be conclusive by way of collateral estoppel because the unsuccessful party cannot obtain the decision of the appellate court upon the matter decided adversely to him. The fact that a party who might have appealed fails to do so is immaterial; but the fact that he is unable to appeal is of importance.

<sup>12</sup> Both the majority and the dissenting judge below agreed that the prior appeal had been dismissed for mootness and not because of any failure on the Government's part to comply with the rules of the court below. See R. 81, 88. But cf. Br. in Opp., pp. 1, 13. See also Appendix B, *infra*, pp.

through no fault of the Government relating to these cases. In addition, it is true, as respondent points out (Br. in Opp., p. 12), that it was the executive arm of the Government which issued the decontrol order which made the injunction suit moot. But this action, which, for present purposes, is comparable to the congressional repeal of legislation, was motivated by broad policy considerations wholly unrelated to these proceedings (cf. *U. S. ex rel. Norwegian Nitrogen Products Co. v. Tariff Commission*, 274 U.S. 106; *Brownlow v. Schwartz*, 261 U.S. 216) and can hardly be a "fault" the consequence of which is that the Government must suffer denial of its statutory right to appellate review in these cases.

*C. It Is Not a Condition on the Right to Relitigate, Where Justice Requires It, That the Court, on the Previous Appeal, Must Have Reserved to the Appellant a Right to Relitigate Instead of Simply Dismissing the Appeal Unconditionally.*

The court below was able to discern only one avenue of escape from the injustice suffered by a faultless appellant in a situation such as that here presented. It appears to have conceded that when the appellate court, faced with the appeal that has been rendered moot, does not simply dismiss the appeal unconditionally but, by some means, reserves to the appellant the right to raise the issues on the merits in subsequent litigation, a means has

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52-57, which contains the opinion of the Eighth Circuit Court of Appeals in the injunction suit. That opinion is not printed in the record and is, accordingly, reproduced here.

been afforded for a relitigation which is otherwise barred (R. 82-84). But the court below erred in attributing such significance to the action or inaction of the appellate court faced with the moot appeal. In any event, the Court of Appeals for the Eighth Circuit, on the first appeal in this case, did not in fact intend to foreclose relitigation of the merits of the treble damage actions.

1. *The courts have generally not considered the presence or absence of an express or implied reservation of a right to relitigate to be controlling.*—It is not surprising that, as a matter of practice, it has been in only a relatively few cases that the courts have, in the course of their opinions, expressly or implicitly reserved to an appellant, whose appeal has been dismissed as moot, a right to relitigate the merits of his claim in a then-existing or later-arising live controversy. In most instances, such a reservation, if made, would be of only academic significance for the question having become moot, it would remain so. In a large part of the remainder of the situations, the court which is faced with the moot appeal, and even the parties involved, could do little more than guess whether a reservation of a right to relitigate would be anything more than an empty gesture.

Yet the court below deemed it an indispensable condition on the right to relitigate that there have been such a reservation, pointing, in support of that view, to the general practice of this Court to re-



verse or vacate the judgments below in a case that has been rendered moot, instead of simply dismissing the appeal. The Government believes that the court below has misconstrued the import of that practice. The Government maintains further, that if a reservation of a right to relitigate were as crucial as the court below holds, the courts would usually have inserted such a reservation either in its opinion or mandate, since the injustice of denying the right to relitigate has been apparent to practically all the courts to whose attention the question had been brought. But the courts have generally been silent on this question and, where they have spoken, it has not been on the premise that their failure affirmatively to reserve the right to relitigate would result inevitably in the application of the doctrine of *res judicata*.

When the matter has been discussed by the lower courts at all, as in *Gelpi v. Tugwell*; 123 F. 2d 377, 378 (C. A. 1), it has usually been not for the purpose of ordaining the consequence of the action taken but, rather, to predict it as a matter of law. Thus, as the dissenting judge below said (R. 88), the statement of the First Circuit in the *Gelpi* case that " 'that judgment will not become *res judicata*' etc., obviously means that the judgment necessarily, as a matter of law, is not *res judicata*, and it can hardly be read as a mere direction to insert a reservation in the order of dismissal in the particular case, for the order itself uses the unqualified language, just like our own in *Fleming v. Munsing-*

*weir, supra*, [dismissing the mooted injunction appeal], 'The appeal is dismissed.'''<sup>13</sup> And when this Court has discussed the matter, it has done so pursuant to a general policy that doubts as to the right to relitigate should be removed, and not in terms of a judgment as to whether, in a particular case, a right to relitigate should be accorded. See *infra*, pp. 32-33.

We turn then to the practice of the courts in reference to the form of mandate adopted in dismissing moot appeals. Were it true, as the court below seems to suggest, that the primary mode of reserving a right to relitigate is by reversal or vacation of the judgment, the appeal from which has become moot, one would expect that this course would have been even fairly consistently followed by the courts. But such is not the case. On several occasions, even this Court has dismissed appeals in moot cases without more. *Chandler v. Wise*, 307 U. S. 474; *Jones v. Montague*, 194 U. S. 147; *American Book Co. v. Kansas*, 193 U. S. 49; *Tennessee v. Condon*, 189 U. S. 64; *Mills v. Green*, 159 U. S. 651; *Singer Manufacturing Company v. Wright*, 141 U. S. 696; *Little v. Bowers*, 134 U. S. 547; cf. *Richardson v. McChesney*, 218 U. S. 487; *Codlin v. Kohlhausen*, 181 U. S. 151. In none of these cases is there any indication that the Court intended that there flow

<sup>13</sup> The action of the majority below, in looking beyond the mandate to the opinion in the *Gelpi* case, is inconsistent with its insistence that *res judicata* is completely symmetrical and mechanical, being applicable as of course where the trial court judgment has been left unreversed and not vacated.

any consequences different from those flowing from its vacation of the judgment below. Indeed, at least some of these cases clearly show that the judgment below which was left untouched was no more regarded as being *res judicata* than when the judgment below was vacated. Thus in *American Book Co. v. Kansas*, *supra*, the Court patently had no intention that its unconditional dismissal of the writ of error would or should in any way affect the outcome of other litigation then pending between the same parties which had been called to its attention (see 193 U. S. at 50). Similarly in *Singer Manufacturing Company v. Wright*, *supra*, this Court, in unconditionally dismissing the appeal for mootness, expressly indicated that the dismissal would not be a bar in another action. There, the complainant had sought to enjoin the collection of a Georgia tax on the ground that the law was invalid. An injunction had been denied, but pending appeal to this Court, the taxes had been paid under protest. The Court said (141 U. S. at 700):

\* \* \* If this enforced collection and protest were sufficient to preserve to the complainant the right to proceed for the restitution of the money, upon proof of the illegality of the taxes, such redress must be sought in an action of law. It does not continue in existence the equitable remedy by injunction which was sought in the present suit. The equitable ground for relief prayed ceased with the payment of taxes.

*The appeal must therefore be dismissed; and it is so ordered.*

That the Court has not intended that any significance be attached to the form of its order dismissing moot appeals is further manifest from its citation of cases such as *Mills v. Green*, *supra*, and *American Book Co. v. Kansas*, *supra*, in which the dismissal was unconditional, in situations where the dismissal was accompanied by a direction to reverse or modify the judgment below. See, e.g., *Hodge v. Tulsa County Election Board*, 335 U. S. 889; *United States ex rel. Norwegian Nitrogen Products Co. v. Tariff Commission*, 274 U. S. 106; *Brownlow v. Schwartz*, 261 U. S. 216; *Atherton Mills v. Johnston*, 259 U. S. 13; *Berry v. Davis*, 242 U. S. 468, 470. The Court's sole reason for adopting the practice of eliminating the judgment below in dismissing moot appeals was not, as respondent urges (Br. in Opp. p. 6), because the judgment, if allowed to remain standing would in fact be *res judicata*, but rather for the purpose of forestalling the possibility of such a contention. *Brownlow v. Schwartz*, 261 U. S. 216; *United States v. Anchor Coal Co.*, 279 U. S. 812. In *Brownlow v. Schwartz*, this Court noted (261 U. S. at 218):

\* \* \* The case being moot, further proceedings upon the merits can neither be had here nor in the court of first instance. To dismiss the writ of error would leave the judgment of the Court of Appeals requiring the issuance

of the mandamus in force—at least apparently so—notwithstanding the basis therefor has disappeared. Our action must, therefore, dispose of the case, not merely of the appellate proceeding which brought it here. The practice now established by this Court, under similar conditions and circumstances, is to reverse the judgment below and remand the case with directions to dismiss the bill, complaint or petition. \* \* \* [*Italics supplied*].

Also militating against the holding below is the fact that most of the courts of appeals do not appear to have followed the practice of eliminating the judgment below in order to destroy any basis for a contention of *res judicata*. In response to our inquiry addressed to the clerks of the eleven courts of appeals,<sup>14</sup> only the Court of Appeals for the Fourth Circuit has advised that it follows the practice of eliminating the judgment below in dismissing appeals for mootness. Appendix A, *infra*, pp. 48-49. The Sixth Circuit has not adopted this practice. Appendix A, *infra*, p. 50. The Seventh and Tenth Circuits as well as the Eighth Circuit, the court below here, not only do not follow this Court's practice, but appear instead to have adopted the procedure, followed here, of merely dismissing the appeal. Appendix A, *infra*, pp. 50, 51, 52. The First Circuit apparently also follows the practice of merely dismissing the appeal sub-

<sup>14</sup> We have received answers from all the courts of appeals. The letter which we sent and replies received are set out in Appendix A, *infra*, pp. 43-52.



ject, however, to the prayer in the motion requesting dismissal or the terms of the agreement between the parties if done pursuant to stipulation.<sup>15</sup>

Appendix A, *infra*, pp. 45-47. The Third Circuit customarily does not issue any mandate in dismissing an appeal as moot since it does "not consider this a final determination requiring a directive from the appellate court to the lower court. Instead we send a certified copy of the order of dismissal to the clerk of the district court." Appendix A, *infra*, pp. 47-48. The Second,<sup>16</sup> Fifth, and District of Columbia Circuits have no established practice for the disposition of moot appeals. Appendix A, *infra*, pp. 47, 49-50, 44-45. The Ninth Circuit has not passed upon the matter. Appendix A, *infra*, p. 52. Thus there is a complete lack of uniformity among the courts of appeals as to the disposition of an appeal in a moot case, with a substantial number of the courts disposing of such cases merely by dismissing the appeal. Certainly, if the courts of appeals had regarded the form of the mandate disposing of the appeal as determining whether relitigation would be permissible, they would have been careful to

<sup>15</sup> This procedure confirms the analysis, by the dissenting judge, of the opinion of the First Circuit in *Gelpi v. Tugwell*, see *supra*, pp. 29-30.

<sup>16</sup> See the Second and Third Circuit cases cited *supra*, note 6, p. 16, in which it does not seem to have occurred to the courts that the injustice which was recognized as a consequence of applying the *res judicata* bar might be averted by vacating the judgment below rather than merely dismissing the appeal.

adhere closely to the practice of this Court. The fact that several courts of appeals, including the Eighth Circuit, have not followed that practice, demonstrates very sharply, we believe, that they did not intend that when they dismissed an appeal without more, the judgment below should stand as a bar to relitigation.

In these circumstances, there is plainly no substance to the holding below that as a matter of general legal principle, the consequence of the court's failure to eliminate the judgment below when it dismissed the appeal in the injunction suit is that the district court's judgment bars relitigation of the same issues in the treble damage actions.<sup>17</sup> By the same token, there is no merit to respondent's claim, repeatedly asserted (Br. in

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<sup>17</sup> The holding below in the instant cases creates substantial problems particularly if applied to appeals dismissed by courts which have not adopted this Court's practice of disposing of mooted cases. These difficulties are illustrated in *Securities & Exchange Commission v. Harrison* (C.A.D.C. No. 10043), decided on petition for rehearing, July 20, 1950, petition for writs of certiorari to be filed shortly. In that case, the Court of Appeals for the District of Columbia Circuit dismissed the SEC's appeal as moot without directions to vacate the temporary injunction issued by the trial court. While appellees were urging before the Commission that the trial court's injunction was *res judicata* as to certain issues in the Commission proceeding, it was not thought, prior to the instant decision, that the bare dismissal of a moot appeal resulted in the trial court's judgment being *res judicata*. After the court below issued its opinion in the instant cases, the Commission petitioned the Court of Appeals for the District of Columbia Circuit for rehearing, requesting the court to amend its order by also directing the vacation of the district court's injunction for the express purpose of avoiding the difficulties presented by the holding below here. That court on July 20, 1950 refused to amend its prior order, on

Opp., pp. 8-10, 13, 14), that an appellant whose appeal is dismissed as moot without more, is obliged to exhaust every possible avenue to have the judgment below also vacated, with the penalty for failure being that that judgment will bar re-litigation of the same issues in a different proceeding between the parties. In the light of the *Restatement* rule (*supra*, p. 13), and the implicit approval which appears from the general practice of the courts outlined above, the Government was clearly not remiss in neglecting to ask the dismissing court also to eliminate the district court's judgment. The failure of Government counsel to attain the extraordinarily high degree of prescience which would have been required to anticipate the judgment of the court below is hardly ground for penalizing the Government in this litigation.

2. *The court which dismissed the injunction appeal for mootness did not intend to foreclose consideration of the merits of the treble damage actions.*—Even if this Court should be of the view that the court below properly held that the judgment

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the ground that in the circumstances it would not be "consonant to justice" to vacate the trial court's judgment. It regarded cases such as *United States v. Hamburg-American Co.*, 239 U. S. 466 (*supra*, pp. 18-19), as distinguishable since those cases involved not actually pending litigation in which a plea of *res judicata* based upon the judgment in the mooted controversy had been made, but only a possibility or probability of such litigation. The Government will shortly file petition for writs of certiorari to protect its rights in the event that this Court holds that the decision below in the instant case is correct.

left standing by the unconditional dismissal of an appeal for mootness operates to preclude relitigation of the same issues in another proceeding between the same parties, we believe that the court below erred in the holding that such is the result here. It is clear, as is evident from this Court's established practice in disposing of moot cases (see, *supra*, p. 17), that it is within the power of the court dismissing the appeal to eliminate the possibility of a *res judicata* plea in subsequent proceedings. And, although in the instant cases, the dismissing court did not follow this Court's practice, we think that, considered in light of its opinion and the requirement that the case be disposed of in the manner "most consonant to justice" (*United States v. Hamburg-Amerikanische Co.*, 239 U. S. 466, 478), the failure expressly to vacate the judgment was clearly not intended to foreclose relitigation of the same issues in the treble damage actions.

In *Gelpi v. Tugwell*, 123 F. 2d 377 (C.A. 1), as has already been noted, the court's order uses, as did the order here, the unqualified language "The appeal is dismissed." The court's opinion expressly noted, however, that "Since appellant, without fault on her part, is prevented from obtaining a review of the judgment below merely because, from intervening events, the appeal has become moot, that judgment will not become *res judicata* on the issues involved, in any subsequent

litigation based upon a different cause of action.” (123 F. 2d at 378). See, also, *Rawlings v. Claggett*, 174 Miss. 845. The court below, as we have already discussed, *supra*, p. 30, fn. 13, regarded that statement as a valid reservation on the otherwise unconditional dismissal of the appeal and distinguished the *Gelpi* case on that ground.

Although the dismissing court here (composed of entirely different judges from those which sat on the court below in this case) did not go as far as the court in the *Gelpi* case in making it clear that its dismissal of the appeal for mootness was not to be *res judicata* in subsequent litigation, its opinion, as we read it, plainly indicates that it similarly did not intend, by dismissing the appeal, to foreclose relitigation of the same issues. See, *Singer Manufacturing Company v. Wright*, 141 U. S. 696; *American Book Company v. Kansas*, 193 U. S. 49. The court recites in its opinion that the first “complaint separately stated two causes of action, one for the recovery of damages, and the other for an injunction,” which, the court stated it had previously held, “are distinct causes of action.” Appendix B, *infra*, p. 56. The opinion further expressly noted that pursuant to the agreement of the parties and the order of the district court, the claim for damages was held in abeyance and that no evidence in support of that claim was introduced, and consequently, “that at the close of the case as tried the only relief which plaintiff,



if his contentions were sustained, was entitled to was a permanent injunction. On appeal therefore, the injunction case only was brought to this court." 162 F. 2d at 127. Appendix B, *infra*, p. 56.

By these observations it seems to us, as it did to the dissenting judge below, that the court made it clear that it was dealing only with the question of mootness of the suit for an injunction, and that "it viewed the treble damage rights as being protected by the agreement and order in the trial court and as therefore being unaffected in the circumstances by a refusal to hear the injunction appeal on its merits" (R. 89). Respondent's claim before that court that the case was moot gives substantial currency to this reading for, as the dissenting judge below points out, if respondent "was intending afterwards to assert that the issue of price violation in relation to the suspended treble-damage count was adjudicatively affected, then it had no basis for urging that the controversy as it was at that time before the court had become moot, and it can hardly escape the imputation of bad faith and wilful misrepresentation." But even if the claim now asserted by respondent be assumed to involve no more than a "tactical afterthought" on respondent's part, the dissenting judge continued, "A litigant should not be permitted to profit from his misleading of the court, whether wilful or not." (R. 89).

In addition, the citation by the dismissing court of its opinion in *Woodbury v. Porter*, 158 F. 2d 194 (C.A. 8), which had been issued only a few months previously, further indicates that it did not understand that its action in the injunction suit would, in any way, affect the treble damage suits. Appendix B, *infra*, p. 56. In that case, the defendant insisted that the treble damage and injunction claims constituted one cause of action and, hence, that the earlier issuance of the permanent injunction enjoining it from continuing to violate the applicable maximum rent regulations barred the Price Administrator's separate suit for treble damages for past violations. In an opinion written by the same judge who wrote the opinion dismissing the injunction suit here, the court held that the action for treble damages was distinct from that for injunction, and stated (158 F. 2d at 196):

\* \* \* The injunctive relief is for protection from future violations, while the action for damages is the remedy afforded for violations that have already taken place. We are clear that the judgment enjoining the defendant from further violations of the Act did not constitute a bar to the subsequent action for damages. \* \* \* By the same test it is clear that the doctrine of *res judicata* does not apply. The judgment appealed from is therefore affirmed.

In these circumstances, we think it clear that although the dismissal of the appeal from the denial

of the injunction did not expressly vacate the judgment below, the court no more intended that the district court's judgment thus left unvacated should operate as a bar to relitigation of the same issues in the treble damage action than did the First Circuit by unqualifiedly dismissing the appeal in the *Gelpi* case. As the dissenting judge added, the majority's failure so to read the opinion "seems to me an unnecessary refusal to give effect to the expressed intention and action of another division of this Court" (R. 89).<sup>18</sup>

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<sup>18</sup> Should the failure of the Court of Appeals to eliminate the district court's judgment on the injunction count be regarded as leaving that judgment to stand as a bar to relitigation of the same issues in the treble damage count, we suggest that it might very well be within the power of this Court now to correct that omission by directing that the dismissal of the appeal in the injunction count be amended to vacate the judgment of the district court. Both the injunction and treble damage counts appeared in a single complaint and might well be sufficiently interrelated to be considered parts of a single proceeding, particularly in light of the effect of the action taken in the injunction count, via *res judicata*, on the treble damage count. So viewed, the court's dismissal of the appeal in the injunction count (R. 43) is part of the case brought before this Court by the writ of certiorari (*Smith v. McCullough*, 270 U. S. 456, 461; *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U. S. 251, 258-259; *Messenger v. Anderson*, 225 U. S. 436, 444; *Lutcher & Moore Lumber Co. v. Knight*, 217 U. S. 257, 267; *Panama Railroad v. Napier Shipping Co.*, 166 U. S. 280, 284; but see *Toledo Co. v. Computing Co.*, 261 U. S. 399, 417, 418) and accordingly may be corrected in this proceeding. *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U. S. 241; *Jameson & Co. v. Morgenthau*, 307 U. S. 171; *Gully v. Interstate Natural Gas Co.*, 292 U. S. 16; *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 292 U. S. 386.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

PHILIP B. PERLMAN,  
*Solicitor General.*

H. G. MORISON,  
*Assistant Attorney General.*

STANLEY M. SILVERBERG,  
*Special Assistant to  
the Attorney General.*

PAUL A. SWEENEY,  
MELVIN RICHTER,  
*Attorneys.*

SEPTEMBER, 1950.

## APPENDIX A

The letter which the Government sent to the clerks of all the courts of appeals on August 10, 1950 reads:

DEAR SIR:

The Supreme Court of the United States has granted certiorari in *United States v. Munzingwear, Inc.*, Nos. 23-24, October Term, 1950. In these cases, the Court of Appeals for the Eighth Circuit has held that the unconditional dismissal of an appeal on the ground of mootness is *res judicata* in subsequent proceedings between the same parties on issues involved in the prior proceedings. In so holding, the Court of Appeals regarded as distinguishable the decisions, including those of the United States Supreme Court, where, in disposing of cases which have become moot pending decision, the court has adopted the practice of not only dismissing the appeal as moot but also of directing the vacation of judgment below and the dismissal of the complaint.

In connection with the preparation of the Government's brief in these cases, we desire to know if your court has any established practice in disposing of cases which have become moot during the pendency of appeal, and, if so, what that practice is. We would appreciate whatever information you could furnish us in regard thereto and, if available, we would like to have a copy of a typical mandate issued by your court in such cases.

Sincerely yours,

(s.) ARNOLD RAUM,  
*Acting Solicitor General.*



The answers received in response thereto follow:

1. District of Columbia Circuit.

DEAR MR. RAUM:

I have your letter of August 10 in which you inquire as to whether this court has any established practice in disposing of cases which have become moot during the pendency of an appeal.

I am unable to state that there is any established practice in the disposition of such cases. I have, however, very carefully examined our dockets and find that the great bulk of cases which are dismissed are by agreement of counsel. Many of these may be dismissed because the issues are moot, but this is impossible to ascertain. Counsel frequently desires to have an appeal dismissed for any number of reasons and in such instances the clerk furnishes counsel with a form of an agreement of dismissal, a copy of which is enclosed. When such an agreement is filed a certified copy of the same is sent to the Clerk of the District Court and no mandate is issued.

In examining the dockets I found that there are some cases in which the court has granted motions to dismiss, but the grounds upon which these appeals were dismissed are not readily ascertainable without examination of the individual orders therein. Many are for reasons other than mootness such as failure to file the record. From my examination of the records, I feel that we have had very few cases in which the appeals have been dismissed as being moot. An example is No. 9999—Mc—

*Caffrey v. Royall*—in which the appeal was dismissed as moot. I enclose a copy of a mandate which was issued in that case.

A case somewhat similar to what you have in mind is that of *Buck v. Snyder*, No. 9847. The court apparently raised the question as to whether the case had abated for failure to substitute as a party the successor in office of a public officer. In this case this court ordered that the judgment of the District Court be vacated and remanded the case to the District Court with directions to dismiss the complaint as abated. A copy of the order of this court in that case is enclosed. No mandate has been issued by this court in this case for the reason that a writ of certiorari was granted by the Supreme Court on May 8, 1950 (Sup. Ct. Misc. 294).

I should appreciate if you would advise me if I can be of any further service in this matter.

Very truly yours,

JOSEPH W. STEWART,

*Clerk.*

By: (s.) ALLEN J. KROUSE,

*Deputy Clerk.*

## 2. First Circuit.

DEAR MR. RAUM:

Your letter of August 10, 1950, to Mr. Stinchfield has been received and will be turned over to him upon his return from vacation.

For your information, in the *Gelpi v. Tugwell* opinion of this Court, which was cited in the Eighth Circuit's *Munsingwear* opinion, the order of this Court (and therefore the mandate too) merely recited "the appeal is dismissed". The same terminology was used in a consolidated case where some of the appeals were dismissed as moot. In a criminal case where sentences on a conspiracy count were dismissed the mandate recited in part: "The appeals from the judgments in respect to the sentences imposed upon the conspiracy count are dismissed as moot". In neither of the civil cases was there a specific direction for the dismissal of the complaint. In another civil case, as I recall it, the appeal in fact had become moot, but counsel filed a stipulation for dismissal of the appeal before the briefs were filed and the appeal was "dismissed without costs to either party" pursuant to the stipulation.

Sincerely yours,

(s.) DANA H. GALLUP,  
Chief Deputy Clerk.

DEAR MR. RAUM:

This supplements Mr. Gallup's reply of August 16th to your letter of August 10th.

In the few instances where appeals have been dismissed because the cases had become moot during the pendency of appeal, the terminology of the order of this Court and of

the mandate has depended on the prayer in the motion or the agreement in the stipulation.

Sincerely yours,

(s.) ROGER A. STINCHFIELD,

*Clerk.*

### 3. Second Circuit.

DEAR SIR:

With reference to yours of the 10th inst., this court has no established practice in disposing of cases which have become moot during the pendency of appeal.

Where such a case arises, counsel must act affirmatively. This is done, at times, in the form of a stipulation reciting the relief sought and may or may not provide for the issuance of a mandate. If a mandate is to issue, the terms of the stipulation are incorporated in the body of the mandate. The stipulation would be so ordered by a judge of this court. Where counsel choose to proceed by motion before the court the issuance of a mandate would depend upon the court's direction.

Very truly yours,

(S.) ALEXANDER M. BELL,

*Clerk.*

### 4. Third Circuit.

DEAR MR. RAUM:

This is in reply to your inquiry with respect to the practice of this court in disposing of cases which have become moot during the

pendency of appeal. Our rule 36 provides, *inter alia*,

“In each case finally determined in this court . . . a mandate . . . shall be issued to the court . . . below.”

We do not customarily issue a mandate in a case in which the court orders that the appeal be dismissed as moot, because we do not consider this a final determination requiring a directive from the appellate court to the lower court. Instead we send a certified copy of the order of dismissal to the clerk of the district court.

I am enclosing herewith for such value as it may be to you copies of the orders of this court in *U. S. ex rel. Steele vs. Hiatt*, No. 9794, and *Adams vs. Hiatt*, No. 9838. In each of these cases the appeal from a denial of a petition for a writ of habeas corpus was dismissed as moot because the petitioner was released on parole during the pendency of the appeal.

With best regards,

Sincerely yours,

(s.) IDA O. CRESKOFF,  
*Clerk.*

5. Fourth Circuit.

DEAR MR. RAUM:

Replying to your letter of August 10, 1950, beg to advise that the practice in disposing of cases in this Court which have become



moot during the pendency of appeal depends upon the issues involved. Where it appears upon appeal that the controversy has become entirely moot the court sets aside the decree below and remands the case with directions to dismiss.

If it appears that supervening facts require a retrial in the light of a changed situation, the court enters an order to vacate the decree which has been entered and reconstitute the court below with jurisdiction of the cause to the end that issues may be properly framed and the retrial had.

On the other hand cases in which have become moot during the pendency of an appeal in the court, the wording of the decree depends upon the issues involved. I am enclosing copy of an opinion and decree of this court entered in cases which appeals were merely "dismissed as moot" for the reasons set out in the last paragraph of the opinion.

We have had very few cases which have become moot pending appeals.

Trusting the above answers your inquiry, and with kindest regards, I am,

Yours sincerely,

(s.) CLAUDE M. DEAN,

*Clerk.*

6. Fifth Circuit.

DEAR SIR:

With reference to your letter of August 10, in re: UNITED STATES VS. MUNSINGWEAR, INC.,

Nos. 23-24, October Term, 1950, I wish to advise that there is no established practice in this Court in disposing of cases which have become moot during the pendency of appeals.

Trusting this is the information you desire, I am,

Respectfully,

OAKLEY F. DODD,  
*Clerk.*

By (s.) J. A. FELHAN, JR.,  
*Deputy Clerk.*

7. Sixth Circuit.

DEAR SIR:

This court has not established the practice of disposing of cases which have become moot as suggested above.

Yours truly,

(s.) J. W. MENZIES,  
*Clerk.*

8. Seventh Circuit.

DEAR MR. RAUM:

The Court itself takes no action. Counsel in this circuit either move or stipulate to dismiss the appeal as moot, and the Court acts on their motion or stipulation. The Court's order would be the same as any dismissal altho usually carrying the words, "as moot."

Respectfully,

(s.) KENNETH J. CARRICK,  
*Clerk.*

## 9. Eighth Circuit.

DEAR SIR:

I am in receipt of your letter of the 10th instant with reference to United States vs. Munsingwear, Inc., Nos. 23-24, October Term, 1950, in the Supreme Court of the United States, and you inquire whether this Court has any established practice in disposing of cases which have become moot during the pendency of the appeal. You will find in the above cases that the record on the former appeal to this Court, our No. 13391, Fleming, Admr. etc. v. Munsingwear, was made a part thereof, and in that former appeal the judgment and mandate of this Court merely recite that the case came on to be heard on the motion of appellee to dismiss the appeal or affirm the judgment and on the motion of appellee to dismiss the appeal on the ground that the case is moot, and therefore this Court entered its order dismissing the appeal. See 162 F. 2d 125.

In two later cases in this Court, which I now have in mind, namely, Minneapolis & St. Louis Railway Company v. Pacific Gamble Robinson Company, et al., 181 F. 2d 812, the opinion recites that the case has become moot and the appeals were dismissed, although in the judgments in those cases no specific reference was made to that fact.

Yours truly,

(s.) E. E. KOCH,

Clerk.

## 10. Ninth Circuit.

DEAR MR. RAUM:

Replying to your favor dated the 10th instant, I beg to advise that our Court has not passed upon the questions indicated in your letter.

Sincerely,

(s.) PAUL P. O'BRIEN,

*Clerk.*

## 11. Tenth Circuit.

DEAR SIR:

In reply to your letter of August 10, 1950, you are advised that when an appeal becomes moot in this court a motion to dismiss is filed and an order entered dismissing the appeal.

Very truly yours,

(s.) ROBERT B. CARTWRIGHT,

*Clerk.*

## APPENDIX B

The opinion of the court of appeals accompanying the dismissal of the injunction suit (*Fleming v. Munsingwear*, 162 F. 2d 125) follows:

Before GARDNER, WOODROUGH, and THOMAS,  
Circuit Judges.

GARDNER, Circuit Judge.

This was an action brought by appellant's predecessor seeking injunctive relief under

Section 205(a) of the Emergency Price Control Act, as amended, 50 U. S. C. A. Appendix, § 925(a), and for statutory damages under Section 205(e) of the same Act. The complaint alleged two distinct causes of action, one for the recovery of damages and the other for a permanent injunction. The cause of action seeking injunctive relief alone was tried resulting in findings which determined all the controverted issues of fact in favor of appellee and in conclusions of law to the effect that appellant was not entitled to equitable relief. On the findings and conclusions so made, filed and entered the court entered judgment of dismissal and this appeal followed. The parties will be referred to as they appeared in the trial court.

Defendant has filed a motion to dismiss the appeal or to affirm the judgment on the grounds that appellant's statement of points failed to attack any specific ruling or action of the trial court with respect to which error is charged, and that appellant's points constitute an attack only upon the trial court's opinion.

In seeking reversal plaintiff in his brief sets forth his points relied upon as follows: "1. The District Court erroneously dismissed the suit, since, under the proper construction of Maximum Price Regulation No. 221, as amended, defendant had not made sales before February 10, 1942, by written order or contract for the fall and winter season of 1942, nor had it had a written or printed price list for the fall and winter season of 1942, which



was distributed generally to its customers on or before February 10, 1942. 2. The District Court misconstrued Maximum Price Regulation No. 221, as amended, in holding that the term 'for the fall and winter season of 1942' refers to the time when garments were to be resold by retailers or worn by consumers, instead of holding that the term refers to the manufacturer's selling season. 3. The District Court erroneously concluded that defendant's price lists, identified as plaintiff's exhibits I and J, were distributed generally to defendant's customers or prospective customers on or before February 10, 1942, within the purview of Maximum Price Regulation No. 221, as amended. 4. The District Court erroneously concluded that defendant at all times complied in all material respects with Maximum Price Regulation No. 221, as amended." Other than the foregoing, the brief contains no statement of points relied upon and intended to be urged on appeal. Rule 11(b) Fourth of this court provides that appellant's brief shall contain, among other things, "A separate and particular statement of each assignment of error (in criminal cases), or of each point relied upon (in civil cases), intended to be urged, with the record page thereof." Although the court entered detailed findings of fact separately paragraphed and numbered, and likewise entered its conclusions of law on the facts so found, the statement of points relied upon challenges no finding of fact nor conclusion of the law, nor alleged error in the admission or rejection

tion of evidence, and does not direct this court's attention to any specific ruling or action of the trial court. Referring to this rule of court, in *Cohen v. United States*, 8 Cir., 142 F. 2d 861, 863, we said:

"The purpose in requiring that appellant's brief contain a separate and particular statement of each point relied upon intended to be urged, is to point out to the appellate court the specific ruling or action of the trial court which is challenged as erroneous and to limit the presentation in the appellate court to the matters in the specifications as stated in the brief."

See, also: *New York Casualty Co. v. Young Men's Christian Ass'n.*, 8 Cir., 119 F. 2d 387; *American Insurance Co. v. Scheufler*, 8 Cir., 129 F. 2d 143; *E. R. Squibb & Son v. Mallinckrodt Chemical Works*, 8 Cir., 69 F. 2d 685; *Hard & Rand v. Biston Coffee Co.*, 8 Cir., 41 F. 2d 625; *Butler v. United States*, 8 Cir., 108 F. 2d 27; *City of Goldfield v. Roger*, 8 Cir., 249 F. 39.

As the findings are presumed to be correct and as they unchallenged sustain the judgment of dismissal we should be warranted in affirming the judgment. In a second motion, however, defendant moves to dismiss the appeal on the ground that the case has become moot by virtue of the Executive Order of the President of the United States issued on November 12, 1946, annulling all price control regulations issued under the Emergency Price Control Act of 1942 except those covering the

commodities of sugar, rice and rent. As has been observed, the complaint separately stated two causes of action, one for the recovery of damages, and the other for an injunction. We have held that these are distinct causes of action. *Woodbury v. Porter*, 8 Cir., 158 F.2d 194. In the instant case, by agreement of the parties, the injunction case alone was tried, and based upon this agreement the court ordered that the second count of the complaint by which treble damages were sought should be held in abeyance. An examination of the record discloses that no evidence was introduced in support of the claim for damages so that at the close of the case as tried the only relief which plaintiff, if his contentions were sustained, was entitled to was a permanent injunction. On appeal therefore the injunction case only was brought to this court.

The Emergency Price Control Act, Section 205(a) provides that:

“Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining

order, or other order shall be granted without bond."

As has been observed, on November 12, 1946, the President removed defendant's commodities from all price control and as to it annulled Maximum Price Regulation No. 221. The lower court having denied an injunction and there now being no law which would sustain the injunction sought by plaintiff, it seems clear that the case has become moot. As said in *Fleming v. Knudson & Mercer Lumber Co.*, 7 Cir., 159 F. 2d 212, 215:

"Inasmuch, however, as the Regulations upon which the instant action is predicated are no longer in effect, we see no reason why the injunction should be maintained, even though it was proper when issued. The purpose for which it issued no longer exists and we think it should be dissolved."

This court can concern itself only with actual controversies. *Chicago Great Western R. Co. v. Beecher*, 8 Cir., 150 F. 2d 394; *Northwestern Light & Power Co. v. Town of Milford, Iowa*, 8 Cir., 82 F. 2d 45; *Adams v. United States ex rel. Palmer*, 8 Cir., 29 F. 2d 541; *American Book Co. v. Kansas ex rel. Nichols*, 139 U. S. 49, 24 S. Ct. 394, 48 L. Ed. 613.

The appeal will therefore be dismissed.

# **In the Supreme Court of the United States**

OCTOBER TERM, 1950

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Nos. 23, 24

UNITED STATES OF AMERICA, PETITIONER

v.

MUNSINGWEAR, INC.

---

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE EIGHTH CIRCUIT

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## **SUPPLEMENTAL BRIEF FOR THE UNITED STATES**

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This brief is addressed to respondent's contention, advanced in its brief on the merits in this Court for the first time during the appellate review of these cases, that the instant proceedings should be held to have abated for failure timely to substitute a proper party plaintiff (Res. Br. 39-63).

### **QUESTIONS PRESENTED**

1. Whether Executive Orders 9841 and 9842 require that the Secretary of Commerce, and not the United States, be substituted as the party plaintiff in pending treble damage actions insti-



tuted by the Price Administrator on behalf of the United States under Section 205(e) of the Emergency Price Control Act.

2. Whether such a treble damage action is abated by the failure to substitute a successor to the individual holding the office of Price Administrator—or the United States—within six months after his successor assumed his office.

3. Whether 28 U. S. C. 2105 precludes this Court from reversing the ruling of the district court granting the motion of the United States to be substituted as party plaintiff in a treble damage action.

#### EXECUTIVE ORDERS AND RULE INVOLVED

The pertinent provisions of Executive Order 9841 (12 Fed. Reg. 2645) and of Executive Order 9842 (12 Fed. Reg. 2646) are set forth in Appendix A, *infra*, pp. 36-43.

Rule 25(d) of the Federal Rules of Civil Procedure, as it read when the district court granted the motion to substitute the United States,<sup>1</sup> provided:

(d) *Public Officers: Death or Separation From Office.*—When an officer of the United States, the District of Columbia, a

<sup>1</sup> Because of the repeal of 28 U. S. C. 780 and its omission from the 1948 ~~version~~ <sup>revision</sup> of 28 U. S. C., Rule 25(d) has been amended to eliminate the reference to that section and instead to enumerate specifically those governmental officers formerly referred to in the Rule by a general reference to the statutory provision.

state, county, city, or other governmental agency or any other officer specified in the Act of February 13, 1925, c. 229, § 11 (43 Stat. 941), U. S. C., Title 28, § 780, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.

#### STATEMENT OF FACTS

The present cases, as they come before this Court, are treble damage actions instituted against respondent for alleged violation of applicable maximum price regulations. One suit was instituted on June 9, 1944 and the other on June 8, 1945, by Chester Bowles, Administrator, Office of Price Administration on behalf of the United States, in accordance with the authority

vested in him by Section 205(e) of the Emergency Price Control Act (R. 4-6, 44). On March 1, 1946, Paul A. Porter, as Administrator of the Price Administration, was substituted for Chester Bowles in both cases (R. 56).

By Executive Order 9809, issued on December 12, 1946 (11 Fed. Reg. 14281), the Office of Price Administration was consolidated with several other war agencies, to form one agency, the Office of Temporary Controls, headed by an Administrator, who was vested, *inter alia*, with the powers and functions of the Price Administrator, including

The authority to maintain in his own name civil proceedings relating to matters heretofore under the jurisdiction of the Price Administrator (including any such proceedings now pending).

Also on December 12, 1946, Paul A. Porter resigned as Administrator of the Office of Price Administration and Philip B. Fleming took office as Administrator of the Office of Temporary Controls (R. 65). ~~On~~ March 19, 1947, a motion was filed on behalf of Mr. Fleming to substitute him in both pending actions. Argument was heard on the motions on April 14, 1947 since respondent had opposed on the ground that there was no substantial need for continuing the action as required by Rule 25(d) of the Federal Rules

of Civil Procedure. Respondent asserts that at the close of the argument, counsel for OPA stated in response to questioning from the district court—and respondent agreed—that there would be no need to determine the motions unless the court of appeals ~~reversed~~ the district court's judgment in the injunction suit then pending on appeal (R. 71). The district court, according to respondent, reserved its ruling upon the motion.<sup>2</sup>

Thereafter, on April 23, 1947, the President, in accordance with the direction of Congress (Urgent Deficiency Appropriation Act, 1947, 61 Stat. 14, 16), issued Executive Order 9841, providing for the liquidation of the Office of Temporary Controls. Executive Order 9842, also issued on April 23, 1947, provided that as of June 1, 1947 (Appendix A, *infra*, pp. 42-43):

1. The Attorney General is authorized and directed, in the name of the United States, or otherwise as permitted by law, to coordinate, conduct, initiate, maintain or defend:

\* \* \* \* \*

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<sup>2</sup> But see R. 80-81 where the court below stated:

Paul A. Porter, as Administrator of the Office of Price Administration succeeded Bowles as plaintiff. Porter was succeeded by Philip B. Fleming, Administrator, Office of Temporary Controls, and Fleming was eventually succeeded by the United States which was, of course, at all times the real party in interest.

(b) Litigation against violators of regulations, schedules or orders relating to maximum prices pertaining to any commodity which has been removed from price control;

\* \* \* \* \*

On January 28, 1948, a motion was filed by the Government in the district court where the present cases were then pending to substitute the United States as party plaintiff therein. Respondent opposed that motion and cross-moved for an order dismissing the action on the ground, *inter alia*, (1) that Philip B. Fleming, Temporary Controls Administrator, had never been substituted for Paul A. Porter, Administrator of the Office of Price Administration; (2) that the Attorney General, not the United States was the proper party to substitute, and (3) that the motion to substitute came too late (R. 66).

The district court, on April 12, 1948, ordered that the United States be substituted (R. 56). The court thereafter on June 2, 1948 ruled that the district court judgment in the injunction suit, standing unreversed, barred the maintenance of the treble damage actions under the doctrine of *res judicata* (R. 52-56). No question as to abatement was raised by respondent either in its brief filed in the court below or in its brief opposing the granting of the Government's petition for writs of certiorari in these cases.



## SUMMARY OF ARGUMENT

At the outset, it should be noted that there may be some question whether respondent can now make its contention that the instant case should be held to have abated. Although respondent has formulated this contention as an alternative ground on which to support the judgments below, the result, if its contention is accepted, will be not affirmance but vacation of the judgments below. Respondent's right to raise this question accordingly depends upon the question being regarded as jurisdictional, contrary to the holding in *Bowles v. Wilke*, 175 F. 2d 35 (C. A. 7), certiorari denied, 338 U. S. 861. Another obstacle to considering respondent's contention now is presented by 28 U. S. C. 2105 if the reading given that section in the *Wilke* case is deemed to be correct.

## I

Respondent's claim that the provisions of Sections 302 and 402 of Executive Order 9841 require this litigation to be conducted in the name of the Secretary of Commerce, is based on the incorrect holding in *United States v. Allied Oil Corp.*, 183 F. 2d 453 (C. A. 7), the only appellate decision of the several passing on the question which so holds. Executive Order 9842 explicitly vests authority in the Attorney General to maintain price control treble damage actions in the name of the United States. And Sections 302

and 402 of Order 9841 are by their own terms subordinated to Order 9842. Section 302 transferred to the Secretary of Commerce only those functions " \* \* \* not otherwise disposed of by statute or by this or any other Executive order" thereby unmistakably relieving the Secretary of Commerce of all connection, however, nominal, with the pending treble damage litigation assigned by Order 9842 for enforcement in the name of the United States to the Attorney General. Moreover, Section 402, in addition to making no mention of the Secretary of Commerce, is expressly made subject to the provisions of Order 9842. Respondent's reading of the orders as limiting the Attorney General's duties in connection with the pending treble damage actions to the lawyers' functions comparable to those delegated by the Price Administrator to the legal and investigative staff subject to his supervision is inconsistent with Section 402 itself; it further ignores the co-equal status of the Attorney General and the complete control over the litigation vested in him by Order 9842. Our construction of these orders is fully supported by the unanimous agreement among the Office of Temporary Controls, Department of Justice, and Department of Commerce, the executive agencies involved, that the Executive Orders authorized the Attorney General to continue these suits in the name of the United States.

## II

All the courts of appeals which have passed upon the point, except the Court of Appeals for the Seventh Circuit in *Bowles v. Wilke*, *supra*, have rejected respondent's further contention that Rule 25(d) of the Federal Rules of Civil Procedure is here applicable and hence that the failure to make a timely and proper substitution causes the action to abate. These courts have, we believe, properly held Rule 25(d) not to be applicable in these treble damage actions because the United States has always been the real party in interest and, hence, to require substitution under the rule would glorify form over substance. Since Section 205(e) of the Emergency Price Control Act permits the Price Administrator to bring these actions "on behalf of the United States", it is immaterial, as a practical matter, whether action was brought in the name of the Price Administrator on behalf of the United States or in the name of the United States; the real plaintiff remains the same. As the real party in interest, the United States could have instituted these actions in its own name or may be substituted as plaintiff after the action has begun. Permitting the present cases to continue in the name of the United States is therefore, technically, not a matter of substitution at all but rather nothing more than a formal amendment to the caption of the cases to conform them to the true situation.

The history of Rule 25(d), which is the modern version of legislation originally adopted in 1899 at the suggestion of the Court, supports this conclusion. At that time, it was established that where the action of the official involved was personal in nature and the officer was required personally to perform his official duties, his death or resignation from office caused pending litigation to abate. The action would not, however, abate where the duty involved was not personal but rather was an adjunct to a continuing office. Passed in accordance with this Court's suggestion, the Act of 1899 was remedial, intended to affect only the situation where the action would abate; it did not affect—nor was there any need to affect—the situation where departure of a named officer from office did not result in abatement. There is nothing in the subsequent history of the provision to indicate that its purpose was ever changed. So to read Rule 25(d) would be consonant with the purpose of the rules as expressed in Rule 1.

#### ARGUMENT

##### INTRODUCTORY

Respondent contends that in these cases there has been a failure to make a timely substitution of a proper party plaintiff as required by Rule 25(d) of the Federal Rules of Civil Procedure, *supra*, pp. 2-3, and hence that this Court should hold that these cases have abated. This position

is primarily predicated on two decisions of the Court of Appeals for the Seventh Circuit. In one, *Bowles v. Wilke*, 175 F. 2d 35, certiorari denied, 338 U. S. 861, the Seventh Circuit expressly approved the district court's rulings that (1) Rule 25(d) of the Federal Rules of Civil Procedure, *supra*, pp. 2-3, is applicable to treble damage actions under the Emergency Price Control Act such as these here involved, which were originally instituted in the name of the Administrator of the Office of Price Administration in behalf of the United States, and (2) that failure timely to substitute the successor in office consequently results in the suit's abatement. In the second case, *United States v. Allied Oil Corporation*, 183 F. 2d 453, the Seventh Circuit held that Executive Orders 9841 and 9842 issued in April 1947 (Appendix A, *infra*, pp. 36-43) directed that the Secretary of Commerce, and not the United States, was the proper party to be substituted in these treble damage actions and accordingly affirmed the district court's dismissal of such actions in which the United States had been substituted. Relying on these decisions, respondent now urges that the Secretary of Commerce, not the United States, was the only party who could properly be substituted as plaintiff in the treble damage actions here involved, and that since no such substitution was made, and indeed the substitution of the United States was not made within six months after June 1, 1947, when the



functions of the Temporary Controls Administrator in regard to these actions terminated, these suits must be held to have abated under Rule 25(d).

Before turning to these contentions, which we believe to be unsound, we wish to point out that there may be obstacles to respondent's raising these questions here. While it attempts to raise these questions on the theory that they afford an "alternative ground \* \* \* to support the judgments" of the court below (Res. Br. p. 39), respondent does not actually seek to support these judgments. For if its contention that these cases have abated were sound, the result would be not affirmance but rather elimination, by vacation, of the judgments below. *United States ex rel. Claussen v. Curran*, 276 U. S. 590; *Matheus v. United States ex rel. Cunningham*, 282 U. S. 802; see *Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U. S. 631, 637-638. It would therefore seem that respondent's right to raise this issue depends upon the abatement question being jurisdictional. But *Bowles v. Wilke*, 175 F. 2d 35 (C. A. 7), certiorari denied, 338 U. S. 861 held to the contrary, and if that holding is right, this issue is not jurisdictional. But see Brief for Respondent in *Snyder v. Buck*, No. 64, this Term pp. 43-46.

Moreover, since acceptance of respondent's contention would involve reversing the contrary rul-

ing of the trial court in this case on this issue, the Seventh Circuit's reading of 28 U. S. C. 2105 in *Bowles v. Wilke*, *supra*, presents an additional obstacle to respondent's raising the abatement question here. In that case the Seventh Circuit, in addition to holding as already indicated, *supra*, p. 11, held that appellate review of such a ruling was barred by 28 U. S. C. 2105.<sup>3</sup> We think that this reading of Section 2105 is incorrect for the reasons stated in the petition in the *Wilke* case (Petition for a Writ of Certiorari in No. 299; October Term, 1949, pp. 7-15) and in the brief for the Respondent in *Snyder v. Buck*, No. 64, this Term, pp. 43-46. If, however, this Court is of the view that the Seventh Circuit was correct, it would seem that Section 2105 is likewise applicable here to preclude this Court from reversing the ruling of the district court that the United States was properly substituted as the party plaintiff.

## I

EXECUTIVE ORDERS 9841 AND 9842 AUTHORIZED THE SUBSTITUTION OF THE UNITED STATES, NOT THE SECRETARY OF COMMERCE, AS THE PARTY PLAINTIFF IN PENDING TREBLE DAMAGE ACTIONS.

In the district court, where it last raised the question, respondent urged that the question of

<sup>3</sup> 28 U. S. C. 2105 provides:

There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction.

who should be substituted as party plaintiff in pending treble damage actions was governed by the provisions of Executive Order 9842 (R. 66).<sup>4</sup> Now, however, respondent claims that Executive Order 9841 is controlling and that that Order directs that the Secretary of Commerce is the person to be substituted as plaintiff (Res. Br. 42-52). Adhering closely to the reasoning of the Seventh Circuit in the *Allied Oil* case (183 F. 2d at 455), respondent points to Section 302 of the Executive Order 9841 (*infra*, pp. 39-40), which it asserts transferred to the Secretary of Commerce all functions of the Office of Temporary Controls not otherwise transferred in the previous sections of the Order, including the Temporary Controls Administrator's functions in regard to treble damage actions. Respondent then points to Section 402 of that Order (*infra*, p. 40) which provides that functions under the Emergency Price Control Act, allocated among several agencies by other provisions of the order:

\* \* \* shall be deemed to include authority on the part of each officer to whom such functions are transferred hereunder to institute, maintain, or defend in his own name civil proceedings in any court (in-

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<sup>4</sup> Respondent then read Executive Order 9842 to name the Attorney General *eo nomine* as the successor to the Temporary Controls Administrator. It accordingly contended that the Attorney General, not the United States, should be substituted as plaintiff (R. 66).

cluding the Emergency Court of Appeals), relating to the matters transferred to him, including any such proceedings pending on the effective date of the transfer of any such function under this order.

From these sections, respondent concludes that litigation relating to treble damage actions must be maintained in the name of the Secretary of Commerce.<sup>5</sup>

Respondent, we submit, was more nearly right the first time. The *Allied Oil* cases are the only decisions supporting respondent's position. None.

<sup>5</sup> The Seventh Circuit in the *Allied Oil* case sought, as does respondent here (Res. Br. 52-53), further to buttress its conclusions by stating that it would be against the legislative policy, expressed in Section 205 (e) of the Emergency Price Control Act authorizing the Price Administrator to conduct treble damage actions in his own name on behalf of the United States, to permit these suits to be maintained in the name of the United States. 183 F. 2d at 456. But Congress' grant of power to the President by Title I of the First War Powers Act (55 Stat. 838, 50 U. S. C. App. 601) :

\* \* \* to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, governmental corporation, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this title \* \* \*

clearly, we submit, was sufficiently broad to empower the President to authorize the Attorney General to maintain, in the name of the United States, treble damage actions previously brought in the name of the Price Administrator. Cf. *Fleming v. Mohawk Co.*, 331 U. S. 111. See, also *infra*, pp. 25-30.

of the several other cases in which the courts have had occasion to examine the Executive Orders here involved has indicated any doubt that Executive Order 9842 was controlling and that the Attorney General was authorized by that Order to maintain the pending treble damage actions in the name of the United States. *Hal-Mar Dress Co. v. Clark, Director, Division of Liquidation, Department of Commerce*, 165 F. 2d 222 (E. C. A.); *Fleming v. Goodwin*, 165 F. 2d 334, 338 (C. A. 8), certiorari denied *sub nom. Goodwin v. United States*, 334 U. S. 828; *Porter v. Steger*, 74 F. Supp. 109, 113 (D. Md.); *Fleming v. Peoples Natural Gas Co.*, 8 F. R. D. 42, 45 (W. D. Pa.); cf. *United States v. Koike*, 164 F. 2d 155 (C. A. 9).

In the *Hal-Mar Dress* case, the Emergency Court of Appeals had before it a petition to review a determination made under Section 205(e) of the Emergency Price Control Act by the Department of Commerce's Director of the Division of Liquidation. On that petition, the Emergency Court held that it had no jurisdiction to review the "purported determination" because the Director had no power to make the determination. This power, the court noted, went with the power to maintain the related treble damage action under that section. On a careful examination of the Executive Orders, ~~that power~~, the



court ruled that the power was the Attorney General's (165 F. 2d at 224):

It appears that the Attorney General has taken over from the Temporary Controls Administrator the conduct of the suit for treble damages for violation of Maximum Price Regulation 287 which had been instituted against the defendant \* \* \*. This was the suit brought under Section 205(e) with respect to which the determination here in question was sought. In that suit, on the Attorney General's motion, the United States has been substituted as plaintiff in place of the Temporary Controls Administrator. It will thus be seen that the Attorney General is presently engaged in maintaining that suit pursuant to the authority conferred on him by Executive Order No. 9842.

If, as is evident, the Attorney General has succeeded to the Administrator's function of maintaining the suit he has necessarily acquired also the discretionary authority to settle or dismiss it. \* \* \*

\* \* \* \* \*

Our conclusion is that the duty to make the determination called for by the last paragraph of Section 205(e) was transferred to the Attorney General under Executive Order 9842 and, therefore, did not pass to the Secretary of Commerce under the residuary clause of Paragraph 302 of Executive Order No. 9841. It follows, as stated at the outset, that the Director of

the Division of Liquidation of the Department of Commerce, whom the Secretary of Commerce designated to perform his functions under Executive order No. 9841, had no authority to make the determination here sought to be reviewed.

That the *Allied Oil* cases are wrong and the *Hal-Mar Dress* case is correct may easily be demonstrated. Executive Order 9842 in plain language vests authority in the Attorney General to maintain the treble damage actions in the name of the United States. That Executive Order specifically provides (Appendix A, *infra*, p. 42):

1. The Attorney General is authorized and directed, in the name of the United States or otherwise as permitted by law, to coordinate, conduct, initiate, maintain or defend:

(a) Litigation before the Emergency Court of Appeals for and on behalf of the \* \* \* Secretary of Commerce, and the Reconstruction Finance Corporation, respectively;

(b) Litigation against violators of regulations, schedules or orders relating to maximum prices pertaining to any commodity which has been removed from price control;

\* \* \* \* \*

Subparagraph (b) clearly refers to OPA enforcement suits, is not limited to criminal proceedings, as respondent concedes (Res. Br. 47-49), and thus is applicable to the instant cases. Further-

more, that subparagraph, unlike the preceding subparagraph (a), does not direct the Attorney General to conduct the litigation on behalf of any specified officers and, consequently, he is authorized to conduct such litigation "in the name of the United States" as provided in paragraph 1.

In regard to respondent's reading of Order 9841, it should be pointed out here that Section 302 of Order 9841, which respondent claims transfers to the Secretary of Commerce functions regarding treble damage litigation, transfers to him only those functions "not otherwise disposed of by statute or by this or any other Executive order"; this language unmistakably excluded functions specified in Order 9842. *Hal-Mar Dress Co. v. Clark, supra* at 223. Moreover, the portion of Section 402 stressed by respondent refers generally to the maintenance of civil proceedings in any court, but makes no mention of the Secretary of Commerce and, in addition, it expressly subjects the provisions of that section to Order 9842 by concluding:

The provisions of this paragraph shall be subject to the provisions of the Executive order entitled "Conduct of Certain Litigation Arising under Wartime Legislation," issued on the date of this order and effective June 1, 1947.\*

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\* Section 402 probably was intended to apply principally to Section 202(a) of Order 9841 which transferred to the Housing Expediter OPA rent control functions which were not embraced by Order 9842.

Respondent seeks to avoid the impact of Order 9842 by stressing the language "or otherwise as permitted by law" in paragraph 1 which vests authority in the Attorney General "in the name of the United States or otherwise as permitted by law, to coordinate, conduct, initiate, maintain or defend" these actions among others. This phrase, respondent asserts, subordinates the Attorney General's authority under Order 9841 to Section 402 of 9842. But, as we have already shown, *supra*, p. 19, the language at the end of Section 402 specifically provides to the contrary by making Section 402 subject to Order 9842. Moreover, respondent concedes in accordance with the Seventh Circuit holding in the *Allied Oil* case (183 F. 2d at 455-456)—and indeed argues at length (Res. Br. 46-50)—that the Attorney General is charged with the actual conduct and maintenance of the treble damage actions. It argues that this authority extends only to the lawyer's functions in regard to this civil litigation, comparable to the functions which the Price Administrator delegated to the legal and investigative staffs within the Office of Price Administration and subject to his supervision (Res. Br. 46). Section 402, however, authorizes the head of the administrative agency not only to institute actions in his own name, but also to so maintain and defend these actions. The same reasoning by which this latter authority is conceded to be subject to Order 9842 likewise requires that the authorization to

institute the action in the name of the head of the administrative agency be subject to Order 9842. Further, the legal and investigative staffs of the Office of Price Administration <sup>were</sup> ~~was~~ subject to the supervision of the Price Administrator who could review their actions. The Attorney General, on the other hand, stands on an equal footing with the Secretary of Commerce, and, by virtue of paragraph 2 of Order 9842, the Attorney General has complete control of the disposition of this litigation. Thus respondent's analogy fails and its attempted construction of the Orders as reaching the capricious result that the Secretary of Commerce's function in regard to these treble damage actions was solely to lend the use of his name as nominal plaintiff is, we submit, belied by the clear language of the Orders.

Also supporting our construction of the Executive Orders is the fact that it accords with the unanimous understanding of the executive agencies affected, the Office of Temporary Controls, the Department of Justice, and the Department of Commerce. The Temporary Controls Administrator stated to the Attorney General in a letter dated April 30, 1947, one week after the issuance of the Executive Orders and before their June 1,

Paragraph 2 (*infra*, p. 43) provides:

Nothing herein shall be deemed to restrict or limit the powers conferred upon the Attorney General by law with respect to conduct, settlement, disposition or review of litigation.



1947, effective dates, that his understanding of the Executive Orders was that:

1. The Department of Justice will undertake the task of completing the OPA litigation program, so far as decontrolled commodities are concerned, such litigation to be conducted in the name of the United States of America.\*

And, in accordance with this understanding, he transferred the files of the pending cases not to the Department of Commerce but to the Department of Justice. The Department of Justice received these files and on May 19, 1947, in anticipation of the effective date, the Attorney General issued Circular 3987 to all United States Attorneys advising them:

\* \* \* In all OPA cases both in District Court and on appeal, substitute the United States as plaintiff on June 1, 1947, or as soon thereafter as possible.

The Secretary of Commerce has not disagreed with this procedure; he has at no time requested the files, sought to assert jurisdiction over them or over the conduct of the cases, nor has he ever claimed that he properly was, or should have been substituted as, party plaintiff. Indeed, the initial report of the Department of Commerce, Division of Liquidation, states (Interim Progress Report of the Division of Liquidation, Department of

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\* The full text of this letter is set out in Appendix B, *infra*, pp 44-45.

Commerce, June 1, 1947—September 30, 1947, p. 3):

A supplementary action was taken in Executive Order 9842, also dated April 23, 1947, which transferred responsibility for continuing (to its conclusion) the OPA enforcement program to the Justice Department.<sup>9</sup>

Such administrative construction of these Executive Orders which has been consistent and generally unchallenged is entitled to great weight since it involves a contemporaneous construction by those charged with administering the orders. Cf. *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 315; *United States v. American Trucking Assns., Inc.*, 310 U. S. 534, 549. This is particularly true here, since the Executive Orders undoubtedly were issued as a formalization of agreements resulting from discussions among the agencies involved and the President as to the allocation of the functions of the then-to-be-liquidated Office of Temporary Controls. Cf. *United States v. American Trucking Assns., Inc.*, *ibid.*

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<sup>9</sup> The report further states (p. 5):

The transfer of the OPA enforcement function to the Department of Justice involved transmitting approximately 4000 active enforcement cases for prosecution. These cases accounted for 1500 cubic feet of records. At that time also there were 28 price cases pending in the Emergency Court. No personnel were transferred to the Justice Department with this work load.

Accordingly, we submit that it was proper under Executive Orders 9841 and 9842 to substitute the United States as party plaintiff in the instant cases and that respondent's contention that the Secretary of Commerce should have been substituted has no merit.

## II

RULE 25(d) OF THE FEDERAL RULES OF CIVIL PROCEDURE IS INAPPLICABLE TO TREBLE DAMAGE ACTIONS INSTITUTED BY THE PRICE ADMINISTRATOR ON BEHALF OF THE UNITED STATES UNDER SECTION 205(e) OF THE EMERGENCY PRICE CONTROL ACT.

In addition to claiming that the United States was not a proper party to substitute as plaintiff in the instant cases, respondent claims that the substitution came too late under Rule 25(d) of the Federal Rules of Civil Procedure (Res. Br. 53-56).

Executive Order 9841 (Appendix A, *infra*, pp. 36-42) and Executive Order 9842 (Appendix A, *infra*, pp. 42-43) were effective, as far as the present cases are concerned, on June 1, 1947, and the motion to substitute the United States was filed on January 28, 1948 and granted on April 12, 1948. Since both these dates are more than six months after the effective date of the Executive Orders, respondent claims that Rule 25(d) requires that the actions be held to have abated (Res. Br. 53-54). It further urges that although a timely motion to substitute Philip B. Fleming

was made on March 19, 1947, within six months after he succeeded Paul A. Porter on December 12, 1946, and hearing was had thereon, the district court, with the acquiescence of government counsel, did not rule on the motion. Accordingly, respondent contends that for this reason as well, the suits must be held to have abated under Rule 25(d) (Res. Br. 53). Respondent's position on this phase of the case is based entirely upon the Seventh Circuit's holding in *Bowles v. Wilke*, 175 F. 2d 35, to the effect that Rule 25(d) is applicable in OPA treble damage actions originally instituted by the Price Administrator.

We believe, as was stated in our petition in the *Wilke* case (see Petition for a Writ of Certiorari, No. 299, Oct. Term, 1949, pp. 6-7), that that case glorifies "form over substance and reality" and is in square conflict with decisions on this precise point by three other courts of appeals. (*Fleming v. Goodwin*, 165 F. 2d 334 (C. A. 8), certiorari denied, *sub nom. Goodwin v. United States*, 334 U. S. 828; *United States v. Koike*, 164 F. 2d 155 (C. A. 9); *Northwestern Lumber & Shingle Co. v. United States*, 170 F. 2d 692 (C. A. 10).<sup>10</sup> The

<sup>10</sup> See, also, *Porter v. Maule*, 160 F. 2d 1 (C. A. 5); *Ralph D'Oench Co. v. Woods*, 171 F. 2d 112 (C. A. 8); *Seven Oaks v. Federal Housing Administration*, 171 F. 2d 947 (C. A. 4); *United States v. Seigel*, 168 F. 2d 143, 147 *et seq.* (C. A. D. C.), (Judge Edgerton dissenting); *Porter v. Pure Oil Co.*, 7 F. R. D. 577 (E. D. Pa.); *Fleming v. Peoples Natural Gas Co.*, 8 F. R. D. 42 (W. D. Pa.). Moreover, in entering final judgment in *Bowles v. Babar*,

reason why we believe Rule 25(d) to be inapplicable here is that we are concerned not with substituting a successor in office, as to which Rule 25(d)<sup>o</sup> is applicable; but rather with the question whether an action commenced pursuant to statutory authority in the name of a government officer on behalf of the United States may be continued in the name of the United States. Substitution in such an action need not, we submit, comply with the requirements of Rule 25(d)."

Section 205(e) of the Emergency Price Control Act permitted the Price Administrator to bring treble damage actions "on behalf of the United States." "He was not authorized to bring [them] on his own behalf. The right and duty to institute and maintain the action attached to the office and not to the individual who happened to be holding the office at the time the action was

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54 F. Supp. 453, 455 (E. D. Mich.), the court, on its own motion, substituted Chester Bowles for Prentiss Brown as Price Administrator "for orderliness of this record." Indeed, in several federal district courts, general orders of substitution in OPA treble damage action were issued. See, e. g., *Bowles v. Weiner*, 6 F. R. D. 540 (E. D. Mich.); *Bowles v. Goldman*, 7 F. R. D. 12 (W. D. Pa.); *In re Creedon*, 7 F. R. D. 546 (W. D. N. Y.); *Porter v. Sands*, 74 F. Supp. 494 (E. D. N. Y.).

<sup>11</sup> *Fleming v. Mohawk Co.*, 331 U. S. 49, relied on by the Seventh Circuit in the *Wilke* case is inapplicable here. The question there was whether there had been compliance with Rule 25(d); no question was raised whether such compliance was necessary for the further maintenance of the action. Cf. *Fleming v. Goodwin*, 165 F. 2d 334, 338 (C. A. 8), certiorari denied *sub nomine Goodwin v. United States*, 334 U. S. 828.



brought." *Fleming v. Goodwin*, *supra*, at 338. Thus, the Price Administrator was "no more than a nominal plaintiff \* \* \*. The United States, on behalf of which the action was brought, was the real plaintiff. \* \* \* Whether the action is maintained by an official authorized to sue on its behalf, or by the United States in its own name, the real plaintiff remains the same." *United States v. Koike*, *supra*, at 157. See, also, *Northwestern Lumber & Shingle Co. v. United States*, 170 F. 2d 692, 694 (C. A. 10); *Porter v. Maule*, 160 F. 2d 1, 3 (C. A. 5); *Bowles v. Goldman*, 7 F. R. D. 12 (W. D. Pa.); *United States v. Saunders Petroleum Co., Inc.*, 7 F. R. D. 608 (W. D. Mo.); *Porter v. American Distilling Co.*, 71 F. Supp. 483, 488 (S. D. N. Y.).

As the real party in interest, the United States could have instituted these actions in its own name, notwithstanding the fact that the Act permitted the Administrator to name himself as the plaintiff. As this Court stated in *United States v. Summerlin*, 310 U. S. 414, dealing with a similar provision in the National Housing Act, 12 U. S. C. 1702 (310 U. S. at 416):

The claim assigned to the Federal Housing Administrator acting on behalf of the United States became the claim of the United States, and the United States thereupon became entitled to enforce it.

This thesis was elaborated upon in *United States v. Remund*, 330 U. S. 539, where the question re-

lated to whether the priority accorded by R. S. 3466 (31 U. S. C. 191) in decedent's estates to debts owed to the United States extended to notes executed to "the Governor of the Farm Credit Administration." This Court there held that the debts were owed to the United States, since the fact that the Farm Credit Administration was merely one of the many administrative units of the Government established to carry out functions delegated to it by Congress, was not changed by the use of a name other than that of the United States (330 U. S. at 541, 542). The Court further noted that it is immaterial whether the claim be filed in the name of the United States or the name of the officer or agency; "in the latter instance, the claim is necessarily filed on behalf of the United States and the legal effect is the same as if it had been filed in that name" 330 U. S. at 542. See, also *Cherry Cotton Mills v. United States*, 327 U. S. 536; *Inland Waterways Corp. v. Young*, 309 U. S. 517, 524; *Federal Housing Administration v. Burr*, 309 U. S. 242, 249-250.<sup>12</sup>

<sup>12</sup> In *The Sapphire*, 11 Wall. 164, which involved the question whether a suit naming Emperor Napoleon III of France as plaintiff and seeking to recover judgment for damages to a French transport vessel abated with the deposition of Napoleon from the throne, this Court stated (11 Wall. at 168):

\* \* \* The reigning Emperor, or National Assembly, or other actual person or party in power, is but

Moreover, where as here, no change in the cause of action is thereby affected; the real party in interest may be substituted as plaintiff after the action has been begun by another. *State of Nebraska v. Hayden*, 89 Fed. 46 (C. C. D. Neb.); *Winthrop v. Farrar*, 11 Allen (93 Mass.) 398, 400; *Lake Shore and M. S. Railway Company v. City of Elyria*, 69 Ohio St. 414; cf. *Irving Trust Company v. American Silk Mills, Inc.*, 72 F. 2d 288, 290 (C. A. 2), certiorari denied, 293 U. S. 624. This, of course, is consistent with the general purposes sought to be attained by Rules 15(a), (b), 17(a), and 21 of the Federal Rules of Civil Procedure.

In these circumstances, we submit that since the present actions involved "in substance and reality, at all times a controversy between the Government and [respondent]," (*Fleming v. Goodwin*, *supra* at 334, 338), permitting them to continue in the name of the United States "is not

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the agent and representative of the national sovereignty. A change in such representative works no change in the national sovereignty or its rights. The next successor recognized by our government is competent to carry on a suit already commenced and receive the fruits of it. A deed to or treaty with a sovereign as such enures to his successors in the government of the country. If a substitution of names is necessary or proper it is a formal matter, and can be made by the court under its general power to preserve due symmetry in its forms of proceeding.

technically a matter of making a new party at all," (*United States v. Koike, supra* at 157 (C. A. 9)), but "merely amounted to the substitution of the United States, the real party in interest, as the party plaintiff" (*Northwestern Lumber & Shingle Co. v. United States*, 170 F. 2d 692, 694 (C. A. 10)). "The only purpose of substitution in such a case is to keep the record straight so that the judgment finally entered will unquestionably bind the right parties." *Fleming v. Goodwin, supra* at 338. Accordingly, the substitution of the United States as party plaintiff "amounts to nothing more than a formal amendment to the title of the action to conform it to the truth" (*ibid.*) and Rule 25(d) is inapplicable.

The history of Rule 25(d) supports this conclusion. Rule 25(d) is the modern version of legislation originally adopted (Act of February 8, 1899, c. 121, 30 Stat. 822) at the suggestion of this Court in *United States ex rel. Bernardin v. Butterworth*, 169 U. S. 600. In that case, this Court had held that a suit to compel the Commissioner of Patents to issue a patent was abated by the death of the Commissioner and that it could not be revived in the name of his successor, even with the latter's consent. This principle was applied in suits where the action of the government official involved was personal in nature and the officer was required personally to perform

his official duties. At the same time, it had also been held that where the duty involved was not personal but rather was an adjunct to a continuing office, the suit would not abate upon the incumbent's departure from the office. For example, in *Thompson v. United States*, 103 U. S. 480, it was held that a suit against a township clerk, which in reality was a suit against the township to enforce collection of a judgment, did not abate upon the resignation of the clerk. See, also, *Murphy v. Utter*, 186 U. S. 95; *In re Hollon Parker*, 131 U. S. 221; *Commissioners v. Sellew*, 99 U. S. 624. When, as here, the suit is brought by a named officer on behalf of the United States, the suit is, of course, not a personal action falling within the rule of the *Butterworth* case.<sup>13</sup>

In the *Butterworth* case, this Court recognized the distinction between these two situations (169 U. S. at 603, 604), and in there holding the cause

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<sup>13</sup> *Snyder v. Buck*, pending on writ of certiorari, No. 64, this Term (Res. Br. p. 57), is, we believe, distinguishable from the instant cases and falls within the *Butterworth* line of cases. In the *Snyder* case, plaintiff instituted a suit for a mandatory injunction against Admiral Buck, Paymaster General of the Navy, requiring him to pay a death gratuity claimed to be due plaintiff under applicable statutes but failed to substitute Admiral Buck's successor within six months after he had taken office. As we pointed out in our brief in that case (see Brief for Respondent in No. 64, this Term, pp. 17-19), such a suit has traditionally been regarded as a personal one against the officer, and not against the office, and, accordingly, failure to comply with Rule 25(d) results in the suit's abatement.



to be abated because the duty was personal, the Court suggested (169 U. S. at 605) :

In view of the inconvenience, of which the present case is a striking instance, occasioned by this state of the law, it would seem desirable that Congress should provide for the difficulty by enacting that, *in the case of suits against the heads of departments abating by death or resignation*, it should be lawful for the successor in office to be brought into the case by petition, or some other appropriate method. [Italics supplied.]

To meet this suggestion, H. P. 6901, entitled "a bill to prevent the abatement of certain actions," was introduced shortly thereafter. 31 Cong. Rec. 779. The purpose of this bill, as explained in the House Committee report (H. Rep. No. 960, 55th Cong., 2d sess.) and by the member of the House who reported the bill from the Committee (31 Cong. Rec. 3865-3866) was to permit the suit to survive and avoid the necessity of compelling a party to commence a new action against the successor in office. The Act, as then enacted, was not intended to affect—nor was there any need to affect—the situation where the departure of the named officer from office did not result in abatement. *Murphy v. Utter*, 186 U. S. 95, 101-102; *Marshall v. Dye*, 231 U. S. 250, 255; *Irvin v. Wright*, 258 U. S. 219, 224. In *Fleming v. Goodwin*, *supra*, the court of appeals stated (165 F. 2d at 337) :-

The purpose of the Rule, like that of the statute which it superseded, was to provide for the continuance of an action, personal in character, brought by or against a public officer, where a substantial need for continuing the action existed and the action could not, without statutory authority, be maintained against his successor after the officer had ceased to hold office. The statute therefore was intended to cover only such actions, to which a public officer was a party, as would abate upon his separation from office. The need for the statute did not arise out of the death or resignation of Government officers who had brought actions on behalf of the Government. Such a statute was needed because the Supreme Court had ruled, in a number of cases, that actions brought against public officers to compel personal performance of their official duties could not be continued as against their successors, even though the successors consented.

Although the Act of 1899 was replaced by Section 11 of the Judiciary Act of 1925 (43 Stat. 936, 941, 28 U. S. C. (1946 ed.) 780), which in turn was omitted from the revision of Title 28 in 1948 for the stated reason that the same ground is covered by Rules 25 and 81 of the Federal Rules of Civil Procedure (H. Rep. No. 308, 80th Cong., 1st sess., A 239), there is nothing in the subsequent history of the provision to indicate that the purpose of the provision was ever converted from being "purely remedial, designed to remove what

this court in the *Butterworth* case called an "inconvenience'." (*Fix v. Philadelphia Barge Co.*, 290 U. S. 530, 533). To construe Rule 25(d), as respondent urges, as applying to the instant cases which historically would not abate even if no substitution were made, would not only violate the mandate of Rule 1, that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action",<sup>14</sup> but would also hamper "the Government in its efforts, through its proper officers, to enforce its laws or to obtain judgment for money rightfully due it or for statutory damages. The Rule was never intended to relieve defendants, in actions brought on behalf of the Government, of their statutory liability to the Government." *Fleming v. Goodwin*, *supra*, at 337-338.<sup>15</sup>

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<sup>14</sup> Although, in the instant cases, the United States may be barred from reinstituting these cases because of the one-year statute of limitations applicable to treble damage actions (Section 205(e) of the Emergency Price Control Act), the application of the ruling here sought by respondent would cause serious inconvenience to private litigants in similar situations arising in related fields. (cf. *Seven Oaks v. Federal Housing Administration*, 171 F. 2d 947 (C. A. 4).

<sup>15</sup> *Fix v. Philadelphia Barge Co.*, 290 U. S. 530, and *Defense Supplies Corp. v. Lawrence Warehouse Co.*, 336 U. S. 631, extensively relied on by respondent (Res. Br. 54-56, 61) and by the Seventh Circuit in the *Wilke* case 175 F. 2d 35 at 38-39) are distinguishable. The *Lawrence Warehouse* case is based on the special statute relating to the dissolution of the Defense Supplies Corporation. See 336 U. S. at 635-636, fn. 6. The *Philadelphia Barge* case, on the other hand, involved a situa-

## CONCLUSION

For the foregoing reasons, the present cases should be held not to have abated.

Respectfully submitted.

PHILIP B. PERLMAN,  
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H. G. MORISON,  
*Assistant Attorney General.*

STANLEY M. SILVERBERG,  
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MELVIN RICHTER,  
*Attorneys.*

OCTOBER, 1950.

tion where a new suit had been brought in the name of a successor Collector of Internal Revenue on a bond executed to a named Collector "or his successors", after an earlier suit had been held by a district court to be abated for failure to comply with 28 U. S. C. 780, the statutory predecessor of Rule 25(d). The question before this Court related not to the survival of a specific pending action but rather to the survival of the *cause* of action itself. This Court, in deciding that the cause of action had not abated, had no occasion to, nor did it, pass upon the propriety of the district court's holding that the earlier action had abated. Indeed, in discussing the impact of the Act of 1899, the Court, as quoted in the text, specifically recognized its remedial purpose. See *supra* pp. 33-34.

## APPENDIX A

1. Executive Order No. 9841 (12 Fed. Reg. 2645) provides:

### TERMINATION OF THE OFFICE OF TEMPORARY CONTROLS

WHEREAS the Congress, in the Urgent Deficiency Appropriation Act, 1947, approved March 22, 1947, has declared its intent that the Office of Temporary Controls be closed and liquidated by June 30, 1947; and

WHEREAS it is necessary to provide for the orderly liquidation of such Office and the disposition of its residual affairs:

Now, THEREFORE, by virtue of the authority vested in me by the Constitution and Statutes, including the last paragraph of Title I of the First Supplemental Surplus Appropriation Rescission Act, 1946, approved February 18, 1946, Title III of the Second War Powers Act, 1942 as amended by the First Decontrol Act of 1947, section 201 (b) of the Emergency Price Control Act of 1942, as amended, section 2 of the Stabilization Act of 1942, as amended, and Title I of the First War Powers Act, 1941, and as President of the United States, it is hereby ordered, in the interest of the internal management of the Government, as follows:

#### PART I

101. The Office of Temporary Controls, established by Executive Order No. 9809 of December 12, 1946, shall be terminated



and disposition shall be made of its functions according to the provisions of this order.

## PART II

201. The provisions of this Part shall become effective on May 4, 1947.

202. Functions of the Temporary Controls Administrator under the Emergency Price Control Act of 1942, as amended, Executive Order No. 9809, and any other statute, order, or delegation are transferred as follows:

(a) Functions with respect to rent control are transferred to the Housing Expediter and shall be performed by him or, subject to his direction and control, by such officers or agencies of the Government as he may designate.

(b) Functions with respect to price control over rice are transferred to the Secretary of Agriculture and shall be performed by him or, subject to his direction and control, by such officers or agencies of the Department of Agriculture as he may designate.

(c) Functions with respect to (1) subsidies, including determinations of the correct amounts of claims and the recovery of over-payments (but excluding premium-payment functions transferred under paragraph 302 (b) hereof); (2) applications for price adjustments filed under Supplementary Order 9 and Procedural Regulation 6 (Adjustment of Maximum Prices for Commodities and Services under Government Contracts or Subcontracts, 7 F. R. 5087, 5444) of the Office of Price Administration; and (3) the interpretation and application of price and subsidy regulations and orders

which affect the amount of subsidy payable; are transferred to the Reconstruction Finance Corporation.

203. The following functions of the Temporary Controls Administrator are transferred to the Secretary of Commerce and shall be performed by him or, subject to his direction and control, by such officers and agencies of the Department of Commerce as he may designate:

(a) Functions of the President under Title III of the Second War Powers Act, 1942, as amended, vested in the Temporary Controls Administrator immediately prior to the taking of effect of this Part.

(b) Functions with respect to determining, under section 6 (a) of the Strategic and Critical Materials Stockpiling Act, the amount of strategic and critical materials necessary to make up any deficiency of the supply thereof for the current requirements of industry.

(c) Functions under section 124 of the Internal Revenue Code, as amended.

(d) Functions under section 12 of the act of June 11, 1942 (the Small Business Mobilization Act).

(e) Functions with respect to claims relating to the expansion of the capacity of defense plants when such expansion is alleged to have been undertaken at the request of the War Production Board or any of its predecessor agencies.

(f) Functions with respect to claims relating to property requisitioned by the Chairman of the War Production Board or by any of his predecessors.

(g) Except as otherwise provided by statute or this or any other Executive order, all other functions of the Temporary

Controls Administrator which were immediately prior to the taking of effect of Executive Order No. 9809 vested in the Civilian Production Administrator.

204. Executive Order No. 9705 of March 15, 1946 (as modified by Executive Orders Nos. 9762 and 9809) is revoked.

205. Any authority vested in the Temporary Controls Administrator in pursuance of section 120 of the National Defense Act of 1916 (with respect to placing compulsory orders for products or materials) is withdrawn and terminated.

### PART III

301. The provisions of this Part shall become effective June 1, 1947.

302. All functions vested in the Temporary Controls Administrator by Executive Order No. 9809 not otherwise disposed of by statute or by this or any other Executive order are transferred to the Secretary of Commerce and shall be performed by him or, subject to his direction and control, by such officers or agencies of the Department of Commerce as the Secretary may designate. Such functions shall include, but not be limited to, the following:

(a) Functions of the President under the Stabilization Act of 1942, as amended, vested in the Temporary Controls Administrator immediately prior to the taking of effect of this Part.

(b) Functions with respect to premium payments under section 2 (e) (a) (2) of the Emergency Price Control Act of 1942, as amended, insofar as such payments relate to copper, lead, and zinc ores.

(c) Functions with respect to the establishment of maximum prices for industrial

alcohol sold to the Government or its agencies.

(d) The liquidation of the functions of the Office of Temporary Controls and of the agencies thereof, except liquidation relating to functions specifically transferred to other agencies (by the provisions of this order or otherwise).

303. The Office of Temporary Controls is terminated.

#### PART IV

401. The provisions of this Part shall become effective, respectively, on the dates on which functions are transferred or otherwise vested by the provisions of this order.

402. Functions under the Emergency Price Control Act of 1942, as amended, transferred under the provisions of this order shall be deemed to include authority on the part of each officer to whom such functions are transferred hereunder to institute, maintain, or defend in his own name civil proceedings in any court (including the Emergency Court of Appeals), relating to the matters transferred to him, including any such proceedings pending on the effective date of the transfer of any such function under this order. The provisions of this paragraph shall be subject to the provisions of the Executive order entitled "Conduct of Certain Litigation Arising under Wartime Legislation," issued on the date of this order and effective June 1, 1947.<sup>1</sup>

403. (a) The records, property, and personnel relating primarily to the respective

<sup>1</sup> See E. O. 9842, *infra*.

functions transferred under the provisions of this order shall be transferred, and the funds relating primarily to such respective functions shall be transferred or otherwise made available, to the agencies to which such functions are transferred. Such measures and dispositions as may be determined by the Director of the Bureau of the Budget to be necessary to effectuate the purposes and provisions of this paragraph shall be carried out in such manner as the Director may determine and by such agencies as he may designate.

(b) In order that the confidential status of any records affected by this order shall be fully protected and maintained, the use of any confidential records transferred hereunder shall be so restricted by the respective agencies as to prevent the disclosure of information concerning individual persons or firms to persons who are not engaged in functions or activities to which such records are directly related, except as provided for by law or as required in the final disposition thereof pursuant to law.

404. All provisions of prior Executive orders in conflict with this order are amended accordingly. All other prior and currently effective orders, rules, regulations, directives, and other similar instruments relating to any function transferred by the provisions of this order or issued by any agency terminated hereunder or by any predecessor or constituent agency thereof, shall remain in effect except as they are inconsistent herewith or are hereafter amended or revoked under proper authority.



405. As used in this order, "functions" includes powers, duties, authorities, discretions, and responsibilities.

HARRY S. TRUMAN

THE WHITE HOUSE,

April 23, 1947.

2. Executive Order No. 9842 (12 Fed. Reg. 2646) provides:

CONDUCT OF CERTAIN LITIGATION ARISING  
UNDER WARTIME LEGISLATION

By virtue of the authority vested in me by the Constitution and statutes, including Title I of the First War Powers Act, 1941, and as President of the United States and having regard to the established responsibilities and powers of the Department of Justice and of the Attorney General under the statutes of the United States, it is hereby ordered, in the interest of the internal management of the Government, as follows:

1. The Attorney General is authorized and directed, in the name of the United States or otherwise as permitted by law, to coordinate, conduct, initiate, maintain or defend:

(a) Litigation before the Emergency Court of Appeals for and on behalf of the Secretary of Agriculture, the Secretary of Commerce, and the Reconstruction Finance Corporation, respectively;

(b) Litigation against violators of regulations, schedules or orders relating to maximum prices pertaining to any commodity which has been removed from price control;

(c) Litigation arising out of Directive 41, as amended, of the Office of Economic

Stabilization pertaining to the withholding of subsidies because of noncompliance with or violations of control orders.

2. Nothing herein shall be deemed to restrict or limit the powers conferred upon the Attorney General by law with respect to the conduct, settlement, disposition or review of litigation.

3. The functions and duties of the Attorney General under this order shall be performed by him or, subject to his direction and control, by such officers or agencies of the Department of Justice as he may designate, and there shall be made available to the Attorney General, pursuant to the provisions of Executive Order No. 9784 of September 25, 1946, any files or records pertinent to the subject matter hereof.

4. This order shall become effective June 1, 1947.

HARRY S. TRUMAN

THE WHITE HOUSE,

*April 23, 1947.*

## APPENDIX B

The letter of the Administrator, Office of Temporary Controls to the Attorney General dated April 30, 1947 reads as follows:

OFFICE OF TEMPORARY CONTROLS,  
*Washington, D. C., April 30, 1947.*

MY DEAR MR. ATTORNEY GENERAL:

Now that the President has signed the two Executive Orders issued in connection with the prospective dissolution of the Office of Temporary Controls, it may be useful for me to advise you of my understanding of the arrangements desired by you with reference to the termination of the Office of Price Administration. My understanding is as follows:

1. The Department of Justice will undertake the task of completing the O. P. A. litigation program, so far as decontrolled commodities are concerned, such litigation to be conducted in the name of the United States of America.

2. The Department of Justice will undertake the task of conducting all litigation in the Emergency Court of Appeals, except on behalf of the Housing Expediter who will conduct his own litigation in that court;

3. The Department of Justice will not take on any O. P. A. attorneys or other personnel now connected with the above functions;

4. The assumption by the Department of Justice of the above responsibilities, including the case records relating thereto, will become effective June 1, 1947, and after

that date the Department of Justice will have sole responsibility for this litigation;

5. The O. P. A. personnel now engaged in work on the programs set out above will be given termination notices to be effective not later than May 31, 1947, except as certain of such personnel are needed by the Department of Commerce for other activities.

It may perhaps be well for me to call your attention to one difficulty that we must both face in connection with the foregoing. As you will realize, the present O. P. A. legal and enforcement staff is designed to handle the current sizeable workload of active litigation. Although some work has also been done on the preparation of case records for use by the Department of Justice, progress has been necessarily slow because of personnel limitations and in no event will it be possible to complete the indexed transmittals even for all the more important cases prior to June 1. Nevertheless, we will continue to put forth our best efforts on this so as to lighten your task after that date.

I should greatly appreciate an expression from you of your concurrence in the understanding outlined above and in closing I can assure you that you can count on our full cooperation in effectuating the transfer.

Sincerely yours,

(s) PHILIP B. FLEMING,

*Major General, U. S. A.,*

*Administrator.*

The Honorable

THE ATTORNEY GENERAL OF THE UNITED STATES.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, ~~1949~~ 1950

Nos. ~~600, 601~~

23 + 24

UNITED STATES OF AMERICA,

*Petitioner,*

vs.

MUNSINGWEAR, INC.

*Respondent.*

**OPPOSING BRIEF OF RESPONDENT**

JOHN M. PALMER,

*Attorney for Respondent,*

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Minneapolis, Minnesota.

STINCHFIELD, MACKALL, CROUNSE & MOORE,

*Of Counsel.*



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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1949

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Nos. 648, 649

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UNITED STATES OF AMERICA,

*Petitioner,*

*vs.*

MUNSINGWEAR, INC.

*Respondent.*

---

**OPPOSING BRIEF OF RESPONDENT**

Respondent submits the following in opposition to the petition for writs of certiorari.

**QUESTION PRESENTED**

The question more exactly stated is: Where a judgment in an injunction action determines the merits of a controversy and, upon appeal, the Appellate Court would affirm the judgment for lack of error raised but does not do so because the case has become moot pending appeal, is the judgment when left standing after dismissal of the appeal to be deprived of its effect as an estoppel under the law of *res judicata*.

## STATEMENT

Petitioner's statement does not point out a number of relevant facts.

The litigation involves a controversy under the Emergency Price Control Act of 1942. There were three separate causes of action in the District Court. Two causes were combined in one complaint filed on June 8, 1944 (R. 1, 6), and the third made up a separate action commenced on June 8, 1945 (R. 44-46). The first cause sought injunctive relief and the other two sought damages.<sup>1</sup> All three causes involved the issue whether respondent had complied with M. P. R. 221 in fixing its ceiling prices on fall and winter underwear under the first two pricing formulae of the regulation, instead of formulae three and four (R. 1-5, 10-14, 45). At the suggestion of OPA counsel (R. 68), it was agreed at pre-trial to try the injunction cause and to hold the damage causes in abeyance until injunction cause had been determined (R. 21, 69, 71). Trial of the injunction cause resulted in findings that respondent was in compliance with the regulation (R. 36, 42), and judgment was entered on January 19, 1946 (R. 42). Appeal was taken from this judgment to the Eighth Circuit which rendered decision on June 19, 1947. 162 F. (2d) 125. This was the first appeal.

On the first appeal, the Court noted that respondent interposed a motion to dismiss or affirm the judgment on the ground that appellant had raised no point of error in respect to the findings of fact and conclusions of law, as required by Eighth Circuit rule. 162 F. (2d) at 126. Upon consideration of this motion, the Court found that no point of error had been raised, and stated that "we should be war-

<sup>1</sup>The Eighth Circuit holds that a cause of action for injunction under §205 (a) of the Emergency Price Control Act is a cause separate and distinct from a cause for treble damages under §205 (e) of the Act. *Woodbury vs. Porter*, 158 F. (2d) 194. This premise has not been questioned in the litigation below.

ranted in affirming the judgment." 162 F. (2d) at 127. However, the Court dismissed the appeal, in response to a second motion of respondent, on the ground of mootness arising from the Government's order of November 12, 1946, annulling all price control regulations except as to sugar, rice and rent. Finding that the only case carried up was the injunction action and that no effective relief could be granted, the Court ordered the appeal dismissed without any saving qualifications (R. 43). Thereafter, no action was taken by the Government at any time in the Courts below to modify, reverse, or vacate the judgment of the District Court, nor was any similar relief sought here by application for certiorari.

Respondent later relied upon the judgment on the merits in the injunction action, left standing after dismissal of the appeal, as an estoppel preventing the relitigating of the issue of its compliance with the OPA regulation involved in the damage actions (R. 64). The District Court dismissed the damage actions (R. 52-56). Its judgment was affirmed upon a second appeal of the litigation by the Eighth Circuit (R. 79-87), one judge dissenting (R. 87-89).

### **REASONS FOR OPPOSING THE WRITS**

1. The rule announced by the Court below, which accorded conclusive effect to the prior judgment which had been left standing after dismissal of the appeal, is in harmony with settled law.

A judgment possesses the attribute of conclusiveness so long as it remains unmodified under the basic law laid down in *Southern Pacific R. Co. vs. U. S.*, 168 U. S. 1, at 48-49:

"The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue



and directly determined by a Court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, *so long as the judgment in the first suit remains unmodified.*" (Italics added.)

This rule was based upon public policy. The Eighth Circuit recognizes that the rule of the *Southern Pacific* case "has long been settled doctrine on the subject." *Brooks vs. Arkansas-Louisiana Pipe Line Co.*, 77 F. (2d) 965 at 967. The same attribute of conclusiveness is possessed by a judgment under the basic law in Minnesota, so long as the judgment remains unreversed. *Jordahl vs. Berry*, 72 Minn. 119, 122; 75 N. W. 10, 11; *Harried vs. Deaver*, 193 Minn. 618, 622; 259 N. W. 189, 191.

Dismissal of an appeal leaves the judgment below in full force, as though no appeal had been taken. *Deming vs. United States*, 10 Wall. (U. S.) 251; *Board of Flour Inspectors vs. Glorier*, 161 U. S. 101. Where appeal taken from a judgment is not allowed or perfected, the judgment below stands as an estoppel under the law of *res judicata*, and an issue actually decided upon the judgment cannot be litigated again upon a different cause of action. *Milne vs. Deen*, 124 U. S. 525, 534; *Hubbell vs. U. S.*, 171 U. S. 203; *Southern Pacific R. Co. vs. U. S.* (C. A. 9th), 133 Fed. 662, 667; affirmed 200 U. S. 354. In the first cited case of *Milne vs. Deen*, 124 U. S. at 534, the Court said:

"It (the prior judgment) not being set aside by subsequent proceedings, by appeal or otherwise, it was equally effective as an estoppel upon the point decided, whether the decision was right or wrong." (Matter in parentheses added.)

This is the rule applied by numerous state courts where

appeals have been dismissed on various grounds.<sup>2</sup>

No exception to the rule is recognized where an appeal is dismissed as moot. The Courts of Appeal of the Second and Third Circuits hold in cases involving the federal prohibition law that where an appeal is dismissed on the ground that the case has become moot pending appeal, it leaves the judgment below standing as an estoppel in subsequent proceedings. *Wynne vs. Harrison Beverage Co.* (C. A. 3rd), 60 F. (2d) 483; *Interboro Beverage Co. vs. Doran* (C. A. 2d), 52 F. (2d) 35; see also *Rahayel vs. McCambell* (C. A. 2d), 55 F. (2d) 221, 222; *Wynne vs. Union City Brewing Co.* (C. A. 3rd), 60 F. (2d) 479.

This Court expressly recognized that dismissal of an appeal in a moot case will leave the judgment undisturbed. In consequence, it adopted the practice of determining whether or not to eliminate the judgment by reversal. *South Spring Hill Gold Mining Co. vs. The Amador Medean Gold Mining Co.*, 145 U. S. 300. The last cited case was decided in 1892. It was there held that where it appears from the record that it would be "consonant to justice" to eliminate the judgment in a case becoming moot after appeal, the Court will reverse the judgment without passing on the merits. Since that time, this Court has followed the practice of determining on the particular facts of each case whether justice requires the elimination of the standing judgment. Many cases appear where the practice has been observed, but these are typical: *U. S. vs. Hamburg-Amerikanische Co.*, 239 U. S. 466, 477; *U. S. vs. American Asiatic Steamship Co.*, 242 U. S.

<sup>2</sup>*City of San Antonio vs. Brown* (Civil Appeals, Texas), 50 S. W. (2) 344 (Court observed that dismissal of appeal as moot would leave judgment below intact); *Prescott vs. Barnes*, 51 Ia. 409, 1 N. W. 660 (failure to assign error); *Miller vs. Bernecher*, 46 Mo. 194 (lack of assignment of errors); *Faust vs. Carson*, 158 Kan. 479, 148 P. (2) 504, 508 (want of prosecution); *Ackerman vs. Insillo* (Sup. Ct. N. Y.), 171 N. Y. Supp. 79 (failure to comply with statute governing appeals); *Barnett Bros. vs. Western Assur. Co.*, 132 Ark. 434, 201 S. W. 282 (failure to observe appellate court rules).

537; *Leader vs. Apex Hosiery Co.*, 302 U. S. 656; see also 108 F. (2d) 71 at 81. This practice of eliminating the judgment, where the justice of so doing appears, grew out of a recognition of the law which holds that a judgment left standing by dismissal of an appeal will continue in full force under the law of *res judicata*, not upon a useless formality.

2. The Court below was correct in *not* applying the rule of §69(2) of the American Law Institute's *Restatement of the Law of Judgments* for three reasons: (A) its application, here would be contrary to settled law; (B) the assumption upon which the rule is based is contrary to law; and (C) the rule, properly construed, would not warrant its application in the case at bar.

(A) Application of §69(2) in this case would bring that rule in conflict with the settled law. As we have outlined under our point one, a judgment is accorded conclusive effect so long as it remains unmodified or unreversed; and where an appeal is dismissed on any ground, including mootness, it leaves the judgment below intact and conclusive under the law of *res judicata*. In the case at bar, there is a final judgment on the merits and it was left standing after the appeal was dismissed on the moot ground. Petitioner's claim that the judgment is *ipso facto* deprived of conclusive effect, simply because the appeal was dismissed for mootness, is squarely contrary to the settled law.

(B) The assumption, upon which §69(2) is based, is this: where a party cannot secure a review of a matter determined against him, the judgment is not to be accorded conclusive effect. See *Professor Scott, Collateral Estoppel by Judgment*, 56 Harv. L. Rev. 1 at 15-16. This assumption is contrary to *Johnson Co. vs. Wharton*, 152 U. S. 252, which holds that the conclusiveness of a judgment is in no way

affected by the ability of a party to appeal and obtain a review of the matter determined against him. Petitioner would distinguish the *Johnson Co.* case on the ground that there was no statutory right of appeal due to the small amount in controversy, whereas in the case at bar there is such statutory right. However, the distinction appears quite irrelevant. The question is whether the ability of a party to secure a review upon a matter determined against him shall affect the conclusive character of a judgment. 56 Harv. L. Rev. 1, 15-16. In the *Johnson* case, the party could not secure a review because the jurisdictional sum was lacking, while, in the instant case, the party could not secure a review because the Court lacked power to pronounce judgment on an academic or moot question. *California vs. San Pablo & Tulare R. Co.*, 149 U. S. 308, 314. Lack of power to decide a moot question apparently stems from Section 1, Article 3 of the Constitution of the U. S. See *Muskrat vs. U. S.*, 219 U. S. 346, 351, 356-357. What difference should it make in principle whether review was prevented by law of Congress or law declared in the Constitution or law declared by the Court? Petitioner, enlarging on the distinction, also argues that Congressional intention would be thwarted, if conclusive effect is accorded to the judgment which could not be reviewed on the moot ground. We fail to see how this could be so. We are unaware of any Congressional enactment, and none has been cited, holding that matters which cannot be reviewed because moot in one case must be subject to review when presented in another action.

The Court of last resort in Minnesota, also, holds that the conclusiveness of a judgment is not affected, because the party cannot secure a review of a matter determined against him. *Bolsta vs. Brehmer*, 212 Minn. 269, 3 N. W. (2d) 430. The Wisconsin Court rejected the proposition that inability to appeal and secure appellate review of a matter determined

against a party deprived the judgment of conclusive effect, saying that no cases could be found to support such proposition. *Schofield vs. Rideout*, 233 Wis. 550, 290 N. W. 155, 157; see also *Dolan vs. Scott*, 25 Wash. 214, 65 Pac. 190; *Mayor and City Council of Baltimore vs. Linthicum*, 170 Md. 245, 183 Atl. 531.

(C) §69(2) of the Restatement, if properly construed, has no application to the case at bar.

The rule of §69(2) is based upon the supposed injustice of concluding a party upon a matter determined against him, when to do so would prevent him from obtaining a review of such matter. 56 *Harv. L. Rev.* at 15-16. This thought is embodied in the words of §69(2) itself, i. e., "Where a party to a judgment cannot obtain the decision of an Appellate Court because the matter determined against him is immaterial or moot, the judgment is not conclusive against him," etc. Note particularly the words "cannot obtain the decision of an Appellate Court." The word "cannot" is significant; it denotes impossibility of accomplishment. The rule does not purport to cover the situation where a party *can* obtain the decision of an Appellate Court on the matter determined against him by taking appropriate procedural steps to save the matter for review in the subsequent action.

What petitioner overlooks is this: under Federal practice, a party who cannot secure a review of a matter determined against him *in one action* on account of the mootness of *that* action, may be able to save, by appeal or by other procedural means, the matter determined against him for re-litigation and review in a subsequent action. This Court and the Courts of Appeal have the general, supervisory, appellate power to modify, vacate, affirm or reverse any judgment or decree lawfully brought before them, and to remand with directions to enter such judgment as may be just under



the circumstances. 28 U. S. C., §2106.<sup>3</sup> In the exercise of its supervisory power, this Court has in many instances eliminated the judgment, by reversal or other appropriate direction, in moot cases. See *Walling vs. Reuter*, 321 U. S. 671, 676-677. It has done so of its own motion where it has appeared from the record that there is a meritorious issue which should be saved for future litigation. *South Spring Hill Gold Mining Co. vs. The Amador Medean Gold Mining Co.*, 145 U. S. 300; *U. S. vs. Hamburg-Amerikanische Co.*, 239 U. S. 466, 477.<sup>4</sup> When aggrieved by the judgment of the Eighth Circuit dismissing the first appeal on the ground of mootness, petitioner had the opportunity of applying to that Court, within the time allowed for rehearing, for modification of the judgment dismissing the appeal and for a judgment directing the lower Court to vacate its judgment on the merits and to dismiss the action below without prejudice. *Krauthoff vs. Kansas City Joint Stock Land Bank* (C. A. 8th), 31 F. (2d) 75, 77; see *Northwestern Light & Power Co. vs. Town of Milford* (C. A. 8th), 82 F. (2d) 45; judgment modified 82 F. (2d) 1023, 1024. It also had the opportunity to apply for certiorari and a direction from this Court for reversal of the judgment of the Eighth Circuit on the moot ground and directing the District Court to vacate its judgment and to dismiss the first count of the complaint. *Leader vs. Apex Hosiery Company*, 302 U. S.

<sup>3</sup>For predecessor laws, see 28 U. S. C., 1940 ed., §§876, §877; (R. S. §701; derived originally from Act of September 24, 1789, c. 20, §24, 1 Stat. 85, and superceded by Circuit Court of Appeals Act of March 3, 1891, c. 517, §§ 10, 11, 26 Stat. 829).

<sup>4</sup>In the first appeal of the case at bar, the Eighth Circuit did not so act upon its own motion. The reason apparent from the decision is: Appellant had not demonstrated that there was any real and substantial controversy over appellee's compliance with the regulation, because it had raised no point of error in respect to the matter determined against it in the lower court's findings on the merits. 162 F. (2) at 127. Furthermore, the appellant did not suggest that the court grant any different relief, than dismissal of the appeal.

656; see also 108 F. (2d) 71 at 81; see *Electrical Fittings Corp. vs. Thomas & Betts Co.*, 307 U. S. 241.<sup>5</sup>

§69(2) applies only where it appears that review of a matter determined against a party is impossible of accomplishment. Petitioner assumes that such fact was conclusively established by the dismissal of the first appeal upon the moot ground. However, the dismissal of the appeal did not conclusively establish the fact, because petitioner had the right to apply in the Eighth Circuit or here for relief which would enable it to secure a review of the matter determined against it. Petitioner is in no different position than any party who neglects to appeal, or otherwise fails to take steps necessary to correct a ruling detrimental to his interests. In response to the claim that a party should not be concluded by a prior judgment where appeal therefrom was not possible as a matter of right, the Court of last resort of New York in *Griffin vs. Long Island R. Co.*, 102 N. Y. 449, 453, 7 N. E. 735, 736, said:

"Nor does it change the effect of the judgment because the amount recovered was not sufficient to entitle the plaintiff to appeal, *as a matter of right*, from the general term to this Court. It might as well be urged that the opposite party would not be bound when the

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<sup>5</sup>Professor Scott in 56 *Harv. L. Rev.* at 16 states that the "better practice" is not merely to dismiss the appeal where a case has become moot but to dismiss the action or direct the lower court to do so. He adds, "The result then clearly is that the matter will not be *res judicata*, since there is no judgment on the merits." Is this not a recognition that the dismissal of an appeal will leave the matter of *res judicata* uncertain? If conflict is to be avoided with the settled law which accords conclusive effect to a judgment so long as it remains unmodified or unreversed, it would appear that elimination of the judgment would not only be "better practice" but rather "essential" practice. In dealing with the similar problem presented where a court determines an immaterial matter against a party, Prof. Scott recognizes that there are two ways of securing justice for the aggrieved party; (1) by giving him a right to appeal and strike out the irrelevant matter, or (2) by denying him a right of appeal, but holding the matter without conclusive effect. Although he believes the latter approach is the better, he nowhere claims that where a right of appeal exists, the judgment should also be denied conclusive effect. 56 *Harv. L. Rev.* 16-17; see also the second paragraph of comment "c" to §69 (2) of the Restatement.

right of appeal existed, and the party failed to make the appeal. *This rule would be more especially applicable here, as it does not appear that any application was made to the general term to allow the defendant to appeal, and it therefore cannot be said that the defendant might not have obtained the permission to do so had he made an application for that purpose in due season.*" (Italics added.)

3. The decision below did not create any conflict between circuits.

The case of *Allegheny County vs. Maryland Casualty Co.* (C. A. 3rd), 146 F. (2d) 633, 637, cited by petitioner, is not in point. It involved the conclusiveness of a judgment of the State Court in Pennsylvania and it was not disputed that the Pennsylvania law as to *res judicata* controlled. In the absence of a Pennsylvania decision on the point, the Third Circuit accepted the general statement of the law in §69(2) of the Restatement as the law of Pennsylvania. (Cf. *Bolsta vs. Brehmer*, 212 Minn. 269, 3 N. W. (2d) 430.) The Court made no reference to cases on the point. There was little need for a thorough consideration of the question. Its comments in reference to the Restatement were dictum. The case turned on the point that there was no final adjudication on the merits in the prior action relied upon as *res judicata*.

The case of *Gelpi vs. Tugwell* (C. A. 1st), 123 F. (2d) 377, does not support petitioner's claim of conflict, but, on the contrary, it is in harmony with the decision below and the settled law. In the *Gelpi* case, the Court of its own motion declared:

"Since appellant, without fault on her part, is prevented from obtaining a review of the judgment below merely because, from intervening events, the appeal has become moot, that judgment will not become *res judicata* on the issues involved, in any subsequent litigation based upon a different cause of action. Appellant will be free to attack collaterally the executive order of removal, either in a suit for salary, or in an appropriate

proceeding to test her eligibility to hold certain civil offices should she later aspire thereto."

In short, the Court noticed from the record in that particular case, that appellant was without fault and it would be unjust to conclude the appellant by the judgment; the Court, therefore, reserved to her the right to contest the issue which would otherwise have been foreclosed in subsequent litigation. That such was the affect of the majority opinion, was pointed out by the dissenting judge (123 F. (2d) at 379):

"The opinion of the Court, in dismissing the appeal as moot, reserves to appellant the right to raise in subsequent litigation the same issues which she sought to have us pass on in the present case."

The decision in *Gelpi vs. Tugwell* does not sustain petitioner's contention that in all cases where appellant is prevented from obtaining a review on account of mootness, the judgment is *ipso facto* without conclusive effect. On the contrary, it sustains the settled law, namely: that a standing judgment is conclusive, and, consequently, the Court either of its own motion or at the instance of the party aggrieved, must do something, if the judgment is to be deprived of its conclusive effect.

To say that in all cases which become moot after appeal, the judgment is *ipso facto* without conclusive effect, would not accomplish justice. Appeals become moot for numerous reasons, many times on account of the act or other fault of the appellant. See *Mills vs. Green*, 159 U. S. 651, 653-655. In the case at bar, it was the act of the executive arm of the Government which caused the appeal to become moot.<sup>6</sup> To

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<sup>6</sup>In *Heitmuller vs. Stokes*, 256 U. S. 359, 362, the party whose act caused the case to become moot was charged with costs. In *American Book Co. vs. Kansas*, 193 U. S. 49, a party, whose act of compliance with the state law pending appeal rendered the case moot, experienced the dismissal of his appeal, notwithstanding his showing that the issue was involved in another action between the same parties and that the judgment in the action on appeal had been pleaded as conclusive.

adopt a rule that, in all cases which become moot on appeal the judgment left standing by dismissal of the appeal will *ipso facto* be deprived of its conclusive effect, would work an injustice on the successful party who, through no act or fault of his making, will be deprived of the benefit of his judgment without any opportunity to be heard on the justice of so doing.

4. The decision of the Court below did not deprive petitioner of a right of appeal and review of the matter determined against it on the merits in the injunction action. The petitioner, as we have pointed out above at pages 8 to 10, deprived itself of a review by failing to make the necessary attempt to save the issue for relitigation and review in the damage cases.

Petitioner, furthermore, is in no position to claim that it was aggrieved by its failure to obtain a review of the matter determined against it in the injunction action. It had deprived itself, in any event, of a review of the merits in the appeal of that action by its fault in neglecting to raise any point of error in respect to the lower Court's findings. 162 F. (2d) at 127.

5. No confusion was injected into the law by the decision below and none appears in the passage quoted from the majority opinion by petitioner at p. 11 of its Petition.

Confusion, however, would be injected into the law if petitioner's version of §69(2) of the Restatement were adopted. It would mean that in all cases where an appeal is dismissed as moot, the standing judgment will *ipso facto* be deprived of conclusive effect. Such construction of the rule would be out of line with the settled law and the practice of this Court for more than a half century. See *South Spring Hill Gold Mining Co. vs. The Amador Medcan Gold Mining Co.*, 145 U. S. 300, *supra*. It would be out of line with the rule



laid down in *Southern Pacific R. Co. vs. U. S.*, 168 U. S. 1, 48-49, supra, and the same rule in Minnesota. *Jordahl vs. Berry*, 72 Minn. 119, 122, supra. It also would cause disharmony and confusion between the Federal Courts sitting in Minnesota and the State Courts. The State and Federal Courts have concurrent jurisdiction in non-criminal enforcement action under §205(c) of the *Emergency Price Control Act*. See *Porter vs. Lee*, 328 U. S. 246, 250. The law of Minnesota should be regarded as persuasive, particularly in light of the fact that the question here is the effect to be accorded a judgment of a Federal District Court sitting in Minnesota and does not directly involve the federal statute. See *Caterpillar Tractor Co. vs. International Harvester Co.* (C. A. 3rd), 120 F. (2d) 82, 85; Cf. *Klaxon Co. vs. Stentor Electric Mfg. Co.*, 313 U. S. 487, 496. Minnesota, in line with this Court in *Johnson Co. vs. Wharton*, 152 U. S. 252, supra, rejects the view that inability to secure a review on appeal effects the conclusive character of a judgment. *Bolsta vs. Brehmex*, 212 Minn. 269, 3 N. W. (2d) 430, supra. Yet, petitioner would have the Court adopt and construe §69(2) of the Restatement in a manner at variance with this law as declared by this Court, Minnesota, and other states. See cases, supra, pages 7 to 8. Furthermore, there is no inability to obtain a review apparent in this case. Petitioner had the opportunity to seek review by pursuing the appropriate appellate procedure. Having neglected to embrace the opportunity, petitioner is now in no different position than any party who refuses or neglects to appeal.

## CONCLUSION

Justice does not require that the petitioner be relieved of the conclusive effect of the judgment in the injunction action entered January 19, 1946. The OPA had its day in Court. When it took that judgment up, it raised no point of error with respect to the merits of the findings against it in the Court below, and the Eighth Circuit expressly found that it should be warranted in affirming. 162 F. (2d) 127-128. There is no justice which would call for depriving the judgment below of its conclusive effect in order that petitioner may have another try at searching the same record for error (R. 53). The point that the OPA sought to vindicate was one of interpretation at variance with the express wording of the OPA regulation (R. 31-34). Price control has long since ceased to operate and the nation now faces other problems. Should the litigation be opened up, the controversy would again merely involve the question of interpretation of an OPA regulation which has been almost four years without effect. There was never any question but what the respondent in good faith fixed ceiling prices and adhered to them; the only claim was that it was mistaken in its choice of pricing formulae (R. 28, 40, 41). Prolonging litigation for the sole end of vindicating an interpretation under price control which no longer prevails, would hardly serve the ends of justice or the public good.

For the foregoing reasons, the petition for writs of certiorari should be denied.

Respectfully submitted,

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**Nos. 23, 24**

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**IN THE**  
**Supreme Court of the United States**

**OCTOBER TERM, 1950**

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**UNITED STATES OF AMERICA, PETITIONER,**

**VS.**

**MUNSINGWEAR, INC.**

---

**ON WRITS OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

---

**OPPOSING BRIEF OF RESPONDENT**

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---

**OPPOSING BRIEF OF RESPONDENT**

---

Respondent submits the following in opposition to the brief of appellant.

**QUESTIONS PRESENTED**

The question presented on the *res judicata* point appears to us to be this: Whether a judgment on the merits, valid when entered in an injunction action, becomes void as an instrument of collateral estoppel where the judgment could not be reviewed on the merits and the appeal was dismissed on grounds of mootness.

As an alternative ground, there is presented the question: Whether the judgments of dismissal entered below are sustainable on the ground that the action abated for failure to substitute as party plaintiff, Philip B. Fleming, as Admin-

istrator of the Office of Temporary Controls for Paul A. Porter, Administrator of the Office of Price Administration, within the time allowed for substitution under Rule 25(d) of the Federal Rules of Civil Procedure for the District Courts of the United States; and whether the actions likewise abated for failure to substitute the Secretary of Commerce for said Paul A. Porter, as party plaintiff, within the time allowed by said Rule.

### STATEMENT

We take no issue with appellant's statement, but it should be amplified in certain particulars.

The complaint, in the action commenced on June 9, 1944, sets out two separate causes of action in two separate counts. Count one was for an injunction under §205(a) of the Emergency Price Control Act (R. 1), and count two was for treble damages in an unspecified amount under §205(e) of the Act (R. 4-6). On June 8, 1945, the Administrator brought a separate treble damage action based upon the same charges of violation of Maximum Price Regulation No. 221, as those contained in the first action. Damages, however, were sought for violations in a later period of time (R. 44-46). By stipulation embodied in a pre-trial order, it was provided that the injunction action be tried and that the damage action be held in abeyance until the injunction case had been determined (R. 21). After trial, the injunction case was decided on October 22, 1945 (R. 28-36). Findings of fact, conclusions of law, and order for judgment were entered on January 19, 1946 (R. 36, 41, 42). Judgment was entered upon the findings on the same date, dismissing the injunction action (R. 42).

The District Court found that respondent had complied with Maximum Price Regulation No. 221 and was not in violation hereof (R. 42, para. 3). The Court also found that

it had jurisdiction over the parties and subject matter (R. 42, para. 4).

The injunction case was appealed to the Court of Appeals for the Eighth Circuit. There respondent interposed two motions, one to dismiss or affirm on the ground that appellant had not assigned error as required by court rule (App. Br., p. 53), and another to dismiss on the ground that the Executive Order of the President of the United States decontrolling commodities had rendered the appeal moot (App. Br., p. 55). Although the Court of Appeals found that respondent was correct on its first motion and said it should be warranted in affirming (App. Br., p. 55),\* it took up the second motion and dismissed the appeal on the moot ground (App. Br., pp. 55-57). The Court of Appeals rendered its decision dismissing the appeal on July 19, 1947. *Fleming vs. Munsingwear*, 162 F. (2d) 125.

On January 29, 1948, the District Attorney served a motion to substitute the United States of America as plaintiff (R. 66, para. c). On February 3, 1948, respondent countered with a motion to dismiss the damage actions on the grounds, among others: (1) that the judgment in the injunction action stood as a bar and an estoppel, because it had never been reversed, modified or overruled (R. 64, paras. 1 and 2); and (2) that the actions had abated for failure to make substitution of Philip B. Fleming, Administrator of the Office of Temporary Controls, for Paul A. Porter, Administrator of the Office of Price Administration, or the Attorney General within the period allowed by law under Rule 25(d) of the Rules of Civil Procedure for the District Courts of the United States and Section 780 of Title 15 of U. S. C. A. (R. 64-66, paras. 4 and 5). The motion of the District Attorney to substitute the United States was determined in favor of ap-

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\*The abbreviation "App. Br." is used throughout to refer to the brief of appellant.



pellant and against respondent on April 12, 1948 (R. 56). Thereafter, on May 7, 1948, the District Court heard the motion of respondent grounded upon the *res judicata* point (R. 52, folio 114). On June 2, 1948, the District Court granted respondent's motion addressed to the *res judicata* ground (R. 52-54) and judgments were entered in the damage actions on the same date (R. 54-55).

### SUMMARY OF ARGUMENT

A. Appellant's claim is essentially that the judgment of the District Court in the injunction action is void as an instrument of estoppel under the law of *res judicata*. Under the theory advanced by appellant, a judgment, entered at a time when the District Court has jurisdiction over the parties and the subject matter, becomes a nullity when an event occurs after the entry of judgment which renders the case moot and impossible of review, particularly where, as here, an appeal was taken to the Appellate Court and it dismissed the appeal on the moot ground. However, mootness, occurring after a valid judgment has been entered, does not nullify the judgment. It simply renders the judgment voidable, and subject to being set aside in a direct proceedings brought for the purpose. Appellant has neglected to pursue any proceedings in the Appellate Court for direct attack upon the judgment, although such procedure was clearly marked out in a long line of decisions of this Court, starting with *South Spring Hill Gold Mining Co. vs. The Amador Medcan Gold Mining Co.*, 145 U. S. 390, decided in 1892 and continuing down to the present. To avoid the consequence of its failure to pursue the required procedure for direct attack upon the judgment, appellant would have the Court adopt the rule set out in §69(2) of the *American Law Institute, Restatement of the Law of Judgments*, and *Gelpi vs. Tugwell* (C. A. 1st, 123 F. (2d) 377, which permits collateral attack

upon a valid judgment when offered as a conclusive estoppel in subsequent proceedings. To permit such attack upon a judgment left standing after dismissal of an appeal would be contrary to the policy of certainty in legal relations which underlies the law of *res judicata*. A judgment of record in the District Court is notice to the world that a controversy has been concluded. If it has not been concluded, then, it is essential that there be some positive and unequivocal evidence upon the record showing such fact, in order that the litigants, courts, and third parties not be misled. Such is the policy which underlies the holding of this Court that inability to review a judgment shall not deprive it of conclusive effect. *The Johnson Co. vs. Wharton*, 152 U. S. 252. The same policy underlies the holding that a judgment is not open to collateral attack for want of diversity jurisdiction and jurisdiction in other particulars.

B. Not only would the position taken by appellant be detrimental to the policy of certainty in legal relations, but that position is also contrary to what this Court has recognized as settled propositions of law for many years, namely:

- (1) That a judgment, valid when entered, is not to be deprived of its conclusive effect under the law of *res judicata*, except by direct proceedings brought for the purpose of setting it aside;
- (2) That the dismissal of an appeal leaves the judgment below standing, as if no appeal had been taken. Such has been the premise recognized by this Court in cases which become moot pending appeal. As a result of such premise, this Court long ago adopted the procedure of determining upon the particular facts of the case before it whether justice demanded the dismissal of the appeal, or the vacatur, modification, or reversal of the judgment in moot appeals. *South*

*Spring Hill Gold Mining Co. vs. The Amador Medcan Gold Mining Co.*, 145 U. S. 300, *supra*.

C. Appellant's claim that the Court of Appeals did not intend to leave the judgment in the injunction action standing as an estoppel under the law of *res judicata* when it dismissed the prior appeal, appears unfounded. The judgment and mandate of that Court is the best evidence of what it intended. The judgment and mandate show an unqualified dismissal of the appeal without reservation of anything to appellant. The statements of that Court in the opinion show no clear intention at variance with the judgment of dismissal. Appellant's suggestion that respondent had no business to call the attention of the Court of Appeals to the facts which rendered the case moot upon the prior appeal knowing that issues in other cases would be affected thereby (App. Br., p. 39) is unfounded in law and fact. There was no question but what the only case before the Court of Appeals was the injunction action. Under the decision of this Court in *American Book Co. vs. Kansas*, 193 U. S. 49, it was the plain duty of counsel to bring the problem of mootness to the attention of the Court; because that case holds that an appeal is moot and dismissable upon that ground, notwithstanding that such disposition may affect issues in other litigation pending between the parties.

D. The judgments below dismissing the treble damage actions are supported by an alternative ground, namely: that the actions abated by reason of the failure to substitute the proper party plaintiff within the period of six months allowed by Rule 25(d) of the Federal Rules of Civil Procedure for the District Courts of the United States, following 28 U. S. C. A., §§2071, 2072.

**I. The Policy of Certainty in Legal Relations Which Underlies the Law of Res Judicata Would Be Impaired by the Government's Contention Which Is, Essentially, That a Judgment, Valid When Entered, Becomes Void When an Event Occurs After Entry of the Judgment Which Renders the Case Moot. Judgments as Instruments of Record Would Be Subject to Question for Matters Occurring Outside the Record.**

The question in the instant appeal, as we see it, is whether a judgment valid when entered is rendered void, and its value as an estoppel under the law *res judicata* destroyed by the occurrence of an event some ten months after entry of judgment which renders the case moot and impossible of review. In short, the appellant's claim appears to be that the judgment on the merits in the District Court was rendered ineffective and void by the inability of the Appellate Court to review the case and, therefore, the judgment was open to collateral attack.

That such is the question is brought into sharp relief by the appellant's contention that factors of justice in this case override the policy of certainty in legal relations, because the judgment relied on as *res judicata* is "hardly more than a piece of paper" (App. Br., p. 19). The line of authority relied on by appellant also points to such as the problem in the instant matter. Section 69(2) of the American Law Institute, *Restatement of the Law of Judgments*, broadly states that where a party to a judgment cannot obtain the decision of an Appellate Court because the matter determined against him is moot, the judgment is not conclusive against him in a subsequent action on a different cause of action (App. Br., p. 13). Likewise, the decision of the majority of the First Circuit in *Gelpi vs. Tugwell*, 123 F. (2d) 377, states that a judgment will not become *res judicata* in a subsequent action upon a different cause of action and appellant will be entitled to attack it collaterally (App. Br., pp. 14-15). Such authority

together with the argument addressed to the point that elimination of the judgment by vacation or reversal constitutes at best a desirable but not a critical formality (App. Br., pp. 19-20) points out to us that, in its main aspects, the Government's contention is fundamentally: That the judgment is void as an instrument of *res judicata* and, notwithstanding the fact that the judgment has never been reversed, modified, vacated, or set aside by any direct proceedings upon appeal or otherwise, it is open to collateral attack in the treble damage cases.<sup>1</sup>

On the other hand, respondent claims that the judgment is not void, but only voidable where it cannot be reviewed because some event has occurred after entry of a valid judg-

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<sup>1</sup>The situation presented in the instant appeal is typical of collateral attack. There are here two actions in which the Government seeks treble damages for alleged violation of Maximum Price Regulation No. 221 issued pursuant to the Emergency Price Control Act (R. 4-6; 44). Although the first treble damage action is contained as a separate count in the same complaint as the injunction action (R. 1-6), it is, nevertheless, a separate cause of action, *Woodbury vs. Porter* (C. A. 8), 158 F. (2d) 194, and it was severed from the injunction action by the effect of the pre-trial order directing trial of the injunction case and holding the damage action in abeyance until the injunction was determined (R. 21). The second treble damage action is contained in a separate complaint (R. 44). In the action for injunction, it was determined that the respondent had not violated the regulation and was in compliance with it (R. 42, para. 3). When the Government later moved to have the United States substituted as plaintiff on January 29, 1948 (R. 66, para. (c)), the respondent countered with a motion to dismiss, one of the grounds of which was that the judgment operated as a bar and estoppel on the same issues of violation as those presented in the damage cases (R. 64, paras. 1 and 2; R. 52-53). The Government conceded identity of issues, saying that it would try the damage cases on the same record and evidence as that present in the injunction action (R. 53, begin sixth line from bottom of page). The Government's position that the judgment is not to be accorded any value as a collateral estoppel in the treble damage cases strikes at the validity of the judgment. True, we are concerned with only one of the several values of a judgment, but that would appear to be true of most any case where validity is called in question.

It is typical of *collateral attack* that it strikes at the validity of the judgment, whereas *res judicata* proceeds upon the assumption that the judgment is valid and goes to the question of what issues have been settled by it. See *Freeman on Judgments* (5th Ed.), Vol. 2, Sec. 690, pp. 1327-1329; Vol. 1, Sec. 304, pp. 601-602. Collateral attack occurs where in a subsequent judicial proceeding the judgment is relied upon as a cause of action or defense by one party to the proceeding and the other party sets up the invalidity of the judgment. *American Law Institute, Restatement of Judgments*, Sec. 11, comment (a); see *Trustees of Somerset Academy vs. Picher* (C. A. 1st), 90 F. (2d) 741, 744, cert. den., 302 U. S. 737.



ment which renders the case impossible of review on account of mootness. Such a judgment, we claim, is subject only to direct attack by taking proceedings in the action in which it is rendered to have it vacated or reversed or modified; see *American Law Institute, Restatement of the Law of Judgments*, §11, comment (a), p. 65; but it is not void and open to collateral attack in other actions brought to recover damages. Appellant had the right to apply to the Court of Appeals for the Eighth Circuit to reverse, vacate, or modify the judgment in the injunction action when it was there upon appeal. Appellant then and there had the right to show that it was "most consonant to justice" to reverse or vacate the judgment on the ground of mootness. *South Spring Hill Gold Mining Co. vs. The Amador Mexican Gold Mining Co.*, 145 U. S. 300; *U. S. vs. Hamburg-Amerikanische Co.*, 239 U. S. 466, 477; *Heitmuller vs. Stokes*, 256 U. S. 359, 362; *Dakota Coal Co. vs. Frazer* (C. A. 8th), 267 Fed. 130, 135; *Chicago & N. W. R. Co. vs. Ereland* (C. A. 8th), 289 Fed. 783, 785. Appellant, also, had the right to apply for reversal or vacation of the judgment within the time allowed for rehearing in the Court of Appeals. See *Krauthoff vs. Kansas City Joint-Stock Land Bank* (C. A. 8th), 31 F. (2d) 75, 77; *Northwestern Light & Power Co. vs. Town of Milford* (C. A. 8th), 82 F. (2d) 45; rehearing and decree modified, 82 F. (2d) 1023, 1024. If the Court of Appeals had not granted the relief of reversal or modification, appellant had the opportunity to bring the injunction case here upon application for writ of certiorari and to secure the relief which this Court might find consonant to justice in the circumstances presented. *Leader vs. Apex Hosiery Company*, 302 U. S. 656; *Leader vs. Apex Hosiery Company* (C. A. 3rd), 108 F. (2d) 71, 81. Appellant pursued none of the foregoing or any other proceedings by way of direct attack upon the judgment. It now attacks collaterally, the validity of the judg-

ment tendered as *res judicata* in the damage cases, and advances, as the reasons for so doing, many considerations of justice which properly ought to have been raised in a direct proceedings to reverse, modify or vacate the judgment.

The position taken by the Government (that a judgment valid when entered becomes void when unreviewable for mootness) would impair the policy of certainty in legal relations which underlies the doctrine of conclusiveness of judgments in the law of *res judicata*.<sup>2</sup>

The first disturbing factor in the Government's position is that there never will need to be anything in the record of the case signifying, positively and unequivocally, that the judgment has been modified, reversed, or vacated when an event occurs after entry of the judgment which might render review impossible on account of mootness. A record which signifies to the world at large that Jones has a judgment against Smith will no longer signify such fact, because after Jones got his judgment something might have occurred during the time for appeal which rendered the case moot and impossible of review. It seems to us that if a judgment, which is valid when entered, is to be treated as a nullity on account of some event which occurs generally outside the record, there will also be a clash with the well-settled principle expressed by this Court through Chief Justice Marshall in *Ex Parte Tobias Watkins*, 3 Pet. (U. S.) 193, 207, namely:

"It is universally understood that the judgments of

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<sup>2</sup>The policy underlying conclusiveness of judgments is stated in *Southern Pacific R. Co. vs. U. S.*, 168 U. S. 1, 48-49, in these words:

"This general rule is demanded by the very objects for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

the courts of the United States, although their jurisdiction be not shown in the pleadings, are yet binding on all the world; and that this apparent want of jurisdiction can avail the party only of a writ of error."

Even where lack of jurisdiction may appear from the record itself in a case in the Federal courts, nevertheless, the judgment is not void as an instrument of *res judicata*, but only voidable. It is not open to collateral attack, but only to direct attack by appeal or other appropriate means. *Dowell vs. Applegate*, 152 U. S. 327, *infra*; *Chicot County Drainage District vs. Baxter State Bank*, 308 U. S. 371, *infra*; *Jackson vs. Irving Trust Co.*, 311 U. S. 494, *infra*. From the standpoint of public policy, it would seem of even greater importance to uphold the validity of a judgment where, as here, jurisdiction positively appears in the record of the Court which rendered it (R. 42, para. 4), than in the cases where lack of jurisdiction appears in the record.

Another disturbing factor is that the events which cause mootness after a judgment has been entered generally arise outside the record, for example: changes in the law<sup>3</sup>; conveying disputed title<sup>4</sup>; corporate death<sup>5</sup>; adversary corporate parties passing under common control<sup>6</sup>; settlement of strike<sup>7</sup>; war preventing performance of disputed contracts<sup>8</sup>; payment of disputed tax and license fees under compulsion of contractual penalties<sup>9</sup>; withdrawal of assignments of error<sup>10</sup>. The value of the judgment as a conclusive document will no longer depend on what appears in the record, but, on the

<sup>3</sup>*Pennsylvania vs. Wheeling & Belmont Bridge Co.*, 18 How. (U. S.) 421.  
<sup>4</sup>*Board of Flour Inspectors vs. Glover*, 161 U. S. 101.

<sup>4</sup>*Heitmuller vs. Stokes*, 256 U. S. 359.

<sup>5</sup>*Walling vs. Reuter, Inc.*, 321 U. S. 671.

<sup>6</sup>*South Spring Hill Gold Min. Co. vs. The Amador Medean Gold Min. Co.*, 145 U. S. 300.

<sup>7</sup>*Leader vs. Apex Hosiery Co.*, 302 U. S. 656; see also 108 F. (2d) 71, 81.

<sup>8</sup>*U. S. vs Hamburg-Amerikanische Co.*, 239 U. S. 466.

<sup>9</sup>*American Book Co. vs. Kansas*, 193 U. S. 49.

<sup>10</sup>*Elwell vs. Fosdick*, 134 U. S. 500.

contrary, may depend upon a matter occurring outside the record.

The policy of certainty in legal relationships underlies the decision of this Court in *The Johnson Co. vs. Wharton*, 152 U. S. 252. In an action to recover royalties under a patent license, a former judgment was pleaded as conclusive on the issue that certain steel rails manufactured by defendant were covered by the patent. In answer, defendant claimed that the rails were not covered, and attacked the validity of the former judgment by claiming that it had had no right to review, because the amount involved was too small to enable it to appeal under the then existing Federal statutes. The trial court held the defense insufficient and granted judgment for the amount claimed by plaintiff. This Court pointed out in its opinion that the sole question was whether the conclusiveness of judgments under the law of *res judicata* is in any way dependent upon whether the law subjects such judgments to re-examination by some other court. The question was answered emphatically in the negative, and the decision was expressly grounded on the policy of certainty in legal relationships.<sup>11</sup> The case has been subsequently followed by other courts. *Bolsta vs. Brechmer*, 212 Minn. 269, 271-272, 3 N. W. (2d) 430, 431; *Elk Garden Co. vs. T. W.*

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<sup>11</sup>The language of the Court in *The Johnson Co.* case (152 U. S. 252, at 256-257, is as follows:

"Does the principle of *res judicata*, in its application to the judgments of courts of general jurisdiction, depend, in any degree, upon the inquiry whether the law subjects such judgments to re-examination by some other court? Upon principle and authority these questions must be answered in the negative. We have not been referred to, nor are we aware of, any adjudged case that would justify a different conclusion."

The above passage was immediately followed by this statement of policy:

"The object in establishing judicial tribunals is that controversies between parties, which may be the subject of litigation, shall be finally determined. The peace and order of society demand that matters distinctly put in issue and determined by a court of competent jurisdiction as to parties and subject-matter, shall not be retried between the same parties in any subsequent suit in any court. The exceptions to this rule that are recognized in cases of judgments obtained by fraud or collusion have no application to the present suit."

*Thayer Co.* (D. C. Va.), 206 Fed. 212, 215; *Mayor and City Council of Baltimore vs. Linthicum*, 170 Md. 245, 183 Atl. 531, 532; although, as appellant points out, the problem has not again been presented here due to change in the law by Congress permitting appeals irrespective of the amount involved (App. Br., p. 24). It is also significant that the Wisconsin Supreme Court rejected the proposition that inability to appeal and secure appellate review of a matter determined against a party deprived the judgment of conclusive effect, saying that no cases could be found to support such proposition. *Schofield vs. Ridcutt*, 233 Wis. 550, 290 N. W. 155, 157.

From the standpoint of policy, it would seem that the instant situation is just as strong as that present in *The Johnson Co.* case (152 U. S. 252, supra). The result of a holding that the judgment there valid on its face was invalid as an instrument of *res judicata* because no right of appeal existed, would be to make the validity of judgments depend on something outside the record, namely, a construction of a law dealing with the distribution of the power of courts which, as the Court pointed out (152 U. S. 252 at 260-261), did not expressly cover the subject of *res judicata*. Here also, the validity of a judgment may depend on the effect of an event occurring outside the record.<sup>12</sup>

It may be argued that here there is evidence in the record in the form of the mandate of the Court of Appeals evidencing the fact that the appeal was dismissed on moot grounds (R. 43). However, the dismissal of an appeal does not signify the same thing as a reversal, modification, or vacation

<sup>12</sup>The same policy of certainty in legal relationships appears to underly the holding that a judgment is not to be treated as an ineffective instrument of collateral estoppel, where, subsequent to the entry of judgment, the appellate court decides in another similar case that the law applied in the determination of a right, question, or fact is erroneous. *U. S. vs. Moser*, 266 U. S. 236; *New Orleans vs. Citizens Bank*, 167 U. S. 371, 396-399; *Deposit Bank vs. Frankfurt*, 191 U. S. 499; *Reed vs. Allen*, 286 U. S. 191.



of the lower court's judgment. It does not signify that the judgment has been wiped out, but only signifies abatement of appellate review, as we hereinafter point out, *infra*, pp. 26 to 27. Furthermore, appellant urges the rule contained in §69(2) of the *Restatement of the Law of Judgments*, as the only fair and logical rule (App. Br., pp. 5, 13). That rule contains nothing to indicate that it is limited to the situation where there is a dismissal of an appeal apparent in the record. On the contrary the language reads: "Where a party to a judgment cannot obtain the decision of an Appellate Court, because the matter determined against him is immaterial or moot, the judgment is not conclusive against him in a subsequent action based on a different cause of action." Mr. Scott, one of the reporters to the *Restatement on Judgments*, in his article, "Collateral Estoppel By Judgment," 56 Harv. L. Rev. 1, 15-16, indicates no intention that the rule was to be limited to the situation where the record signifies the dismissal of an appeal on grounds of mootness.

Appellant would distinguish *The Johnson Co.* case (152 U. S. 252, *supra*) on the ground that there the party had no right of appeal conferred by Act of Congress, whereas here there is such right of which appellant was denied without fault on its part, and, consequently, the policy of the Federal statutes allowing appeals in cases such as these will be frustrated (App. Br., pp. 24-26). We fail to see the relevancy of this distinction. The point involved here and the point involved in *The Johnson Co.* case was whether a judgment which could not be reviewed was to be deprived of its effect as *res judicata*. The Court held "no," notwithstanding the argument there urged that the policy of the Constitution would be frustrated—the policy, declaring that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as Congress may ordain and should extend to *all* cases in law and equity. In rejecting

this argument, the Court pointed out that the distribution of judicial power was a matter within the province of Congress, and that it had never been supposed that Congress in making such distribution intended to change the rule of *res judicata* making judgments conclusive (152 U. S. 252 at 260-261). Likewise, here, Congress did not intend to change the law of *res judicata* by a general statutes conferring a right of appeal in cases such as these (App. Br., p. 22, see 50 U. S. C. App. Supp. III, 925(e) and 28 U. S. C. 1291). Furthermore, appellant's distinction would appear without foundation, because it assumes that it was frustrated in its right of appeal through no fault of its own (App. Br., 22-23). This overlooks the fact that appellant had the opportunity by a direct attack to apply for an order reversing, modifying or vacating the judgment, *supra*, pp. 8 to 10.

If justice in this individual case be weighed against the policy of certainty in legal relations, we submit that the policy should not be over-ridden. Appellant had ample opportunity to obtain relief from the judgment which was left standing against it in the District Court. Having neglected to take advantage of the opportunity, appellant should not be permitted to treat the judgment as a nullity for purposes of *res judicata* in subsequent proceedings.

**II. Not Only Would the Policy of Certainty in Legal Relationships Be Impaired, But the Settled Law and Practice Would Also Be Upset if the Government's Contention Were Adopted.**

- A. The attribute of conclusiveness which a judgment enjoys under the law of *res judicata* cannot be taken away from it, except by direct attack upon it, either through appeal or other form of direct proceedings.

In *Southern Pacific R. Co. vs. U. S.*, 168 U. S. 1, 48-49, an action was brought by the Government against the Southern Pacific Railroad to quiet title to lands involved in public grants. The Government relied upon two prior judgments as an estoppel under the law of *res judicata*. The controversy centered mainly on the question of what issue had actually been settled by the prior judgments. The importance of the question prompted this Court to make analysis of considerable authority, as a result of which it expressed the following general rule:

"The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified." (Italics added.)

This rule expressed in the *Southern Pacific* case (168 U. S. 1, 48) has been cited and followed many times in cases dealing with various situations. *Deposit Bank vs. Board of Commissioners of Frankfort*, 191 U. S. 499, 514; *U. S. vs. Moser*, 266 U. S. 236, 241; *Tait vs. Western Maryland R. Co.*, 289 U. S. 623; *Chicago R. I. & P. R. Co. vs. Schendel*, 270 U. S. 611, 617; Cf. *Commissioner vs. Sunnen*, 333 U. S. 591, 597.

598; *Mercoid Corporation vs. Mid-Continent Investment Co.*, 320 U. S. 661, 670. As appellant has pointed out (App. Br., p. 8, footnote No. 2) the rule is sometimes referred to as "estoppel by judgment" or "collateral estoppel." *Commissioner vs. Sunnen*, 333 U. S. 591, 597-598.

When the Court said in the above quoted passage in *Southern Pacific R. Co. vs. U. S.*, 168 U. S. 1, 48-49, that the attribute of conclusiveness continues "so long as the judgment remains unmodified," it showed that such attribute can be taken away from a judgment only by some form of direct attack, such as: modification upon appeal, reversal upon appeal, or modification in a proceedings brought for that purpose in the Court which rendered the judgment (168 U. S. 1, 62). That a judgment enjoys such attribute, so long as it remains unimpeached by a direct proceedings brought for the purpose, is also pointed out in *Milne, Executor of Wilson vs. Deen*, 121 U. S. 525, 534. There a judgment of the Marine Court of New York upon one cause of action was relied upon as an estoppel upon an identical issue involved in a subsequent and different cause of action. It was claimed that the judgment should be accorded no effect as an estoppel, because the record showed that, after judgment was entered, a notice of appeal had been filed. Rejecting this as insignificant, this Court pointed out that nothing appeared in the record of the Marine Court to show that the appeal had been prosecuted and that nothing appeared in the record to show a vacatur of the judgment. On this state of the record, the Court pointed out that there was nothing before it to indicate that the judgment had been impaired. In holding the judgment conclusive as an estoppel, it was said:

"The effect of the judgment is not at all dependent upon the correctness of the verdict or finding upon which it was rendered. *It not being set aside by subsequent proceedings, by appeal or otherwise, it was equally effective as an estoppel upon the point decided, whether*

the decision was right or wrong." (Italics added.)

See also *Chicago R. I. & P. R. Co. vs. Schendel*, 270 U. S. 611, 617; *Reed vs. Allen*, 286 U. S. 191, 201. The rules of law expressed in the *Southern Pacific* case (168 U. S. 1, 48), and *Myline* case (121 U. S. 525, 534), were not mere general formulations of *dicta* irrelevant to the considerations before the Court (App. Br., pp. 8-11). On the contrary, they are expressive of perhaps one of the most fundamental ideas underlying the whole concept of *res judicata*, namely: that a judgment, valid when entered, is not to be treated as void and subject to attack in a collateral proceeding.

It appears to be basic regarding judgments, that such an instrument is presumed to be valid *until* vacated by some proper proceeding instituted directly for the purpose of correcting errors therein, where the judgment is within the jurisdiction of the Court rendering it. See *Cocke vs. Halsey*, 16 Pet. (U. S.) 71, 87-88; *Harvey vs. Tyler*, 2 Wall. (U. S.) 328, 341-342; *Deposit Bank vs. Board of Councilmen of Frankfort*, 191 U. S. 499, 520. In *Stoll vs. Gottlieb*, 305 U. S. 165 at 170, the Court said, in speaking of a judgment of the Federal Court upon a Federal question, that it is final until reversed in an Appellate Court or modified or set aside in the Court of its rendition. Such appears to be the well-settled principle, except only where the judgment is void. See *Dowell vs. Applegate*, 152 U. S. 327; *U. S. vs. United States F. & G. Co.*, 309 U. S. 506, 514.

Even where jurisdiction does not appear from the face of the record in diversity of citizenship cases, it is held that the judgment is not rendered void for purposes of *res judicata*. Such lack of jurisdiction apparent from the record may render the case reversible by a direct attack upon the appeal, but it does not render the judgment void and open to collateral attack when the judgment is tendered as a conclusive defense in a subsequent action. *Dowell vs. Applegate*, 152 U.



S. 327, *supra*; *McCormick vs. Sullivan*, 10 Wheat. (U. S.) 192; *Skellern's vs. May's*, 6 Cranch (U. S.) 267; see *Evans vs. Watson*, 156 U. S. 527, 533.

The *Applegate* case (152 U. S. 327, *supra*) and the line of decisions upon which it was based have not been limited to diversity jurisdiction cases. In *Stoil vs. Gottlieb*, 305 U. S. 165, it was extended to a situation where the question was whether conclusive effect must be given to a Federal Court decree approving a plan of reorganization and cancelling certain guaranties on bonds under §77B of the Bankruptcy Act. It was the claim that the State Court was under no obligation to give effect to the bankruptcy decree as *res judicata*, because the Federal Court in cancelling the guaranties acted in excess of its power. In rejecting this claim, the Court laid emphasis on the fact that its jurisdiction over the subject-matter of the guaranties was litigated and determined, and that no appeal had been taken, and a reversal secured. As a consequence, the issue of jurisdiction over the subject-matter having been actually determined by the judgment, it was not open to collateral attack in the subsequent State Court proceedings. In *Chicot County Drainage District vs. Barber State Bank*, 308 U. S. 371, the doctrine was again extended to the situation where it was claimed that a decree of the District Court, sitting in bankruptcy under Federal statute for the readjustment of municipal debts, was entitled to no effect as *res judicata* in a subsequent action brought in the Federal Court to recover upon certain bonds cancelled as part of the plan of reorganization approved by the decree. The decree had never been reversed or modified by any appeal. However, it was claimed that the statute upon which jurisdiction of the Federal Court rested in the reorganization proceeding had been declared unconstitutional in other litigation subsequent to the decree and, as a consequence, the Court had no jurisdiction from the start to enter

such decree. Rejecting this contention, the Court held that the event of unconstitutionality, occurring after the decree, did not render it void and, therefore, the decree was not open to collateral attack on the issue of jurisdiction. See also, *Jackson vs. Irving Trust Co.*, 311 U. S. 494; *Sherrer vs. Sherrer*, 334 U. S. 343; cf. *U. S. vs. United States F. & G. Co.*, 309 U. S. 506, 514; *Kalh vs. Feurestein*, 308 U. S. 433, 438-439.

The injunction judgment, tendered as conclusive in the treble damage actions involved here, actually determined as a matter of law and fact that respondent was in compliance with the regulation of the Office of Price Administration, and not in violation thereof (R. 42, p. 3). The District Court determined that it had jurisdiction of the parties and subject matter (R. 42, subpara. 4). Upon such determination embodied in findings of fact and conclusions of law (R. 36-42), the District Court entered judgment for respondent on January 19, 1946 (R. 42). It was not until almost ten months later (November 12, 1946) that the President issued the de-control order (11 F. R. 13, 464), and the event took place which rendered it impossible for the Court of Appeals to review the case which was pending before it on appeal. *Fleming vs. Munsingwear, Inc.*, 162 F. (2d) 125, at 127 (App. Br. Appendix B., p. 52). It would seem to us that the Government calls upon this Court to do something more extreme, than what it refused to do in the *Chicot County Drainage District* case (308 U. S. 371, *supra*). There the Court refused to hold the decree void upon the theory of the retroactive unconstitutionality of the law upon which the jurisdiction of the Court was based, whereas, here, the Court is called upon to treat a judgment as void upon the theory of "retroactive mootness."<sup>13</sup>

<sup>13</sup>The taking of an appeal does not have the effect of suspending the judgment as *res judicata*. According to what is said to be the weight of authority, when a case is removed to the appellate court by appeal or writ of error, the

- B. A judgment is not rendered void as an instrument of conclusive effect under the law of *res judicata* by virtue of some event which renders the case moot and impossible of review.

We have been unable to find any cases decided by this Court which hold that a judgment, valid when entered, becomes void as an estoppel under the law of *res judicata*, where it could not be reviewed due to some event which occurred after the judgment was entered rendering an appeal moot. However, there is a line of cases in this Court showing the contrary, namely, that the judgment is voidable only, and subject to reversal on direct attack for such ground.

In a case decided in 1892, *South Spring Hill Gold Mining Co. vs. The Amador Medean Gold Mining Co.*, 145 U. S. 300, the Court had before it an appeal upon a writ of error from a judgment for damages in a trespass case. Both parties were mining corporations. During the pendency of the appeal, both corporations passed under common control. This fact was called to the Court's attention, but it was urged to decide the controversy because a minority group of stockholders had a monetary interest in the result. The Court, however, refused to accede to this request, and it held the case moot. However, it did not dismiss the appeal, saying that to do so would leave the judgment intact and the parties might, therefore, be deprived of a review. After weighing the equity of leaving the judgment in effect with the equity

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case is not tried *de novo*, but the record made below is simply re-examined and the judgment reversed or affirmed; it does not operate to vacate the judgment. *Ransom vs. City of Pierre* (C. A. 8th), 101 Fed. 665, 669; see *U. S. vs. Norfolk & W. R. Co.* (C. C. W. Va.), 114 Fed. 682, 685; *Hovey vs. McDonald*, 109 U. S. 150. Out of the English judicial system, it is said that there evolved two general methods of review: writ of error for law and appeal for equity. The writ of error review heard the case upon claimed errors of the lower court with the result of either affirming, modifying or reversing the judgment. Appeal, however, heard the case *de novo*. In most American jurisdictions, the two systems have been blended and the original identity between the two lost. See 2 *American Jurisprudence*, Sec. 2, pp. 843-844. It appears that under Sections 73 and 75, *Rules of Civil Procedure for the District Courts of the United States*, that appeal partakes of a review proceedings, not a trial *de novo*. Following 28 U. S. C. A., Secs. 2071, 2072.

on the side of eliminating it, the Court decided on the justice present in that case that it would reverse the judgment without passing on the merits and remand the case for further proceedings.<sup>14</sup>

In a subsequent case, decided in 1915, *U. S. vs. Hamburg-Amerikanische Co.*, 239 U. S. 466, 477, the Court had before it a decree dismissing, on the merits, an injunction action brought to enjoin the commission of a certain alleged conspiracy between steamship companies contrary to the Anti-Trust laws. The conspiracies related to the carriage of steerage passengers from Europe to America. After the decree was rendered and while the case was pending on appeal in this Court, the first world war broke out and put a stop to the practices. The Court was urged by the Government to decide the case because the practices might be resumed after cessation of hostilities, but it refused, holding the case moot. However, the Court proceeded to consider how it should dispose of the appeal in the light of the *South Spring Hill Gold Mining* case (145 U. S. 300), *supra*. It held that, considering the particular circumstances presented in the case before it, it would be more consonant to justice not to permit the judgment to stand, but to reverse it with directions to the lower court to dismiss the bill. This was done in order that the Government not be precluded in the future from attacking any such combination.

<sup>14</sup>The language of the Court in *South Spring Hill Gold Mining Co. vs. The Amador Medean Gold Mining Co.*, 145 U. S. 300, *supra*, is this:

"If the writ of error is dismissed the judgment will remain undisturbed, and the plaintiff in error might be cut off from submitting the question involved to the determination of an appellate tribunal; while if the judgment be reversed the minority of the stockholders of the defendant in error would be deprived of an adjudication in its favor. But although the latter might be thereby subject to the delay and expense of further litigation, they would still be free to vindicate whatever rights they are entitled to.

"Without considering or passing on the case in any respect, we deem it most consonant to justice to reverse the judgment and remand the case for further proceedings in conformity to law, and it is so ordered."

The *Apex Hosiery* litigation offers further indication that this Court does not regard the judgment of lower courts as absolutely void, where an event occurs after entry of judgment which renders the case moot and unreviewable. There the District Court refused to enjoin a strike on the theory of Anti-Trust law violation. The Court of Appeals reversed and ordered an injunction to issue. *Apex Hosiery Co. vs. Leader* (C. A. 3rd), 90 F. (2d) 155. Pending petition for certiorari here, the strike was settled, and a rule was issued out of this Court to show cause why the appeal should not be dismissed (58 Sup. Ct. Reporter 140). Upon consideration of the return, this Court did not simply dismiss the appeal, but rather it reversed the Court of Appeals on the ground that the case had become moot, and remanded it to the District Court with directions to vacate its decree and to dismiss the complaint. *Leader vs. Apex Hosiery Co.*, 302 U. S. 656. By so doing, this Court cleared the record, so that the parties were able to try out the issue of Anti-Trust violation in a treble damage action. See *Leader vs. Apex Hosiery Co.* (C. A. 3rd), 108 F. (2d) 71, at 81. In so dealing with a moot case, this Court was applying the practice exemplified in the *Hamburg-Amerikanische* and the *South Spring Hill Mining Co.* cases, *supra*, and followed in a long line of decisions of which these are typical: *U. S. vs. American Asiatic Steamship Co.* (1916), 242 U. S. 537; *Board of P. U. Comm'r vs. Compania General De Tabacos* (1918), 249 U. S. 427; *Commercial Cable Co. vs. Burleson* (1919), 250 U. S. 360; *Alejandro vs. Quezon* (1925), 271 U. S. 528, 535; *Bracken vs. Securities & Exchange Commission* (1936), 299 U. S. 504.

If this Court entertained the view that the judgment below was void and worth hardly more than a piece of paper, we fail to see why it bothers to reverse or vacate lower court judgments in moot cases. To us it seems surprising that this Court would follow a useless practice for some fifty-eight



years (*The South Spring Hill Mining Co.* case, *supra*, was decided in 1892), and why it should bother to admonish a Court of Appeal to follow such practice in a moot case. *Duke Power Co. vs. Greenwood County*, 299 U. S. 259, 267. In deed, the admonition given in the last cited case, grew out of the very premise expressed in the opinion that the District Court could not determine the controversy anew without a vacatur of the decree, *Duke Power Co. vs. Greenwood County*, 299 U. S. 259, at 262-263.

Appellant argues that the practice of this Court to eliminate the judgment by reversal or vacatur is only a formality, and designed merely to clear the record of a judgment which only has the appearance of *res judicata* (App. Br., pp. 19-20, 32).<sup>\*</sup> Appellant cites two cases involving moot appeals (App. Br., pp. 32-33), where this Court remarked that dismissal of the appeal would leave the judgments standing in force or "at least apparently so," notwithstanding the basis for them had disappeared. *Brownlow vs. Schwartz*, 261 U. S. 216; *United States vs. Anchor Coal Co.*, 279 U. S. 812. It does not appear from the opinions that the Court had in mind *res judicata*. The context giving rise to the remarks would indicate that the Court had in mind the enforceability of the decrees. In *Brownlow vs. Schwartz*, 261 U. S. 216, *supra*, the judgment called for the issuance of a mandamus to the building inspector of the District of Columbia to compel him to issue a building permit. The Supreme Court of the District of Columbia dismissed the action. Upon appeal to the Court of Appeals, the Supreme Court was reversed and the cause remanded with directions to issue the writ. Pending writ

<sup>\*</sup>Clearing the record is no mere formality. It is a very important thing, so it would seem to us. Suppose a judgment of the Federal Court is tendered twenty years after its entry in the Court of some foreign state. How is that Court to know whether the controversy was decided by the judgment except by the record. Should the judgment, and on its face, be impeached by the oral testimony of a witness to the effect that after the judgment was rendered and pending appeal, something happened which prevented review of the judgment?

of error here, the building inspector issued the permit and the building was erected. It also appeared that the respondent had sold the building. Under such circumstances, it appears that what the Court had in mind by its remark about "apparent effect" of the judgment was that the judgment could have no value as an instrument to compel the issuance of a building permit, rather than the idea that the judgment would have no value as an instrument of *res judicata* if left standing. The same thing may properly be said of *U. S. vs. Anchor Coal Co.*, 279 U. S. 812. There a three-judge court enjoined the enforcement of an Interstate Commerce Commission order directing carriers to cancel certain rate schedules for the carriage of coal. Upon appeal here, it was found that the argument presented only moot issues. Although the opinion does not disclose what caused the issues to become moot, one may be justified in assuming that new rate schedules were filed which satisfied the Commission.

Furthermore, one additional statement of the Court in the *Anchor Coal Co.* case (279 U. S. 812, *supra*) deserves attention. After pointing out that dismissal of the appeal would leave the injunction in force or at least apparently so, the Court added, "Our action must therefore dispose of the cause, not merely of the appellate proceedings which brought it here" (279 U. S. 8125). This seems a clear indication that the dismissal of an appeal in a moot case constitutes merely the discharge of the appellate proceedings which brought up the case. This seems a clear indication, also, that the dismissal of an appeal in a moot case will leave the judgment below standing. This is in line with what this Court said in the *South Spring Hill Mining Co.* case (145 U. S. 300), and the whole line of cases following the practice of reversing or vacating the judgment below, when to do so would be consonant to justice. The *Anchor Coal Co.* case does not sustain appellant's view that the judgment, if left standing by dis-

missal of the appeal for mootness, becomes *ipso facto* hardly more than a piece of paper so far as *res judicata* may be concerned (App. Br., p. 19).

It appears well-settled that the dismissal of an appeal, regardless of the reason which prompted dismissal, leaves the judgment below standing in force as though no appeal had been taken. *Deming vs. U. S.*, 10 Wall. (U. S.) 251 (dismissal upon motion of appellant's counsel); *Newman vs. Moyers*, 253 U. S. 482, 186 (dismissal as to one party appealing for failure to file appearance); *Prescott vs. Barnes*, 51 Iowa 408, 1 N. W. 660 (dismissal for failure to assign error); *Miller vs. Bernecker*, 46 Mo. 194 (failure to assign errors); *Faust vs. Carson*, 158 Kan. 479, 148 P. (2d) 504, 508; *Chirillo vs. Lehman* (D. C. N. Y.), 38 F. Supp. 65, 67-68 (want of jurisdiction); see *City of San Antonio vs. Brown*, (Civ. App. Texas), 50 S. W. (2d) 344 (dismissal for mootness); *Johnson & Johnson vs. Herold* (C. C. N. J.), 161 Fed. 593, 601 (dismissal for failure to appeal within time allowed by law). Where the ground for dismissing the appeal is mootness, the rule is no different; the judgment below will be left in force. *Board of Flour Inspectors vs. Glover*, 161 U. S. 101; *Gulf, C. & S. F. R. Co. vs. Dennis*, 224 U. S. 503, 509; see *Brownlow vs. Schwartz*, 261 U. S. 216, supra; *U. S. vs. Anchor Coal Co.*, 279 U. S. 812, supra. In a related situation, also, this Court pointed out that dismissal of an appeal will leave the judgment standing. *Oklahoma Gas & Electric Co. vs. Oklahoma Packing Co.*, 292 U. S. 386. There appeal was taken directly from a judgment of a three-judge court under §266 of the Judicial Code denying an injunction to restrain enforcement of a rate order of the Oklahoma Corporation Commission and the prosecution of actions in the state courts based on the order. The Court held that it was without jurisdiction, and pointed out to appellants that, by appealing directly to this Court, they had lost their right to have the

decree below reviewed. In this connection, the Court said:

"We might now terminate the litigation by dismissing the appeal without more, and it would be proper to do so had the correct procedure under Section 266 been more definitely settled at the time the appeal to this Court was attempted."

Although the Court found it appropriate to vacate the decree below because the procedure under §266 was not well enough settled, nevertheless, the indication is clear that the dismissal of an appeal merely signifies the abatement of appellate review. It does not signify that the judgment below is vacated, modified, or reversed, and this seems true whether the ground of dismissal be for mootness or some other reason. A judgment of the District Court is generally regarded an instrument of record constituting notice to the world that a controversy has been conclusively determined. See *Ex Parte Watkins*, 3 Pet. (U. S.) 193, 207, *supra*. Its conclusiveness should not be affected by an act which signifies only that appellate proceedings are abated. The majority below was quite right, we believe, in refusing to accept the theory that the conclusiveness of District Court judgments should not be made to depend upon the reasons which the Appellate Court may give for dismissing an appeal, or whether those reasons are properly based on some fault of the appellant. (R. 86, third paragraph). It would seem contrary to sound judicial administration if, when a judgment is tendered as conclusive evidence upon an issue in a later proceedings, an inquiry must be held to determine whether an appeal was properly taken and dismissed as moot without fault on the part of appellant, as appellant suggests (App. Br., pp. 21-22).

It is the practice of the Court, as appellant points out (App. Br., p. 30), to dismiss appeals in moot cases, as well as to reverse or modify the judgments. *Mills vs. Green*, 159

U. S. 651; *American Book Co. vs. Kansas*, 193 U. S. 49; *Chandler vs. Wise*, 307 U. S. 474; *Schenley Distilling Co. vs. Anderson*, 333 U. S. 878. The Court has a choice of remedies when a case becomes moot while appeal is pending, and the choice is dependent upon what the Court considers to be consonant to justice in the particular case before it. This was clearly indicated in the *South Spring Hill Gold Mining* (145 U. S. 300) and *Hamburg-Amerikanische* (239 U. S. 466, 477) cases, *supra*, where the remedy of dismissal was weighed against the remedy of reversal. In *Walling vs. Reuter*, 321 U. S. 371, 677, it was pointed out that such discretion is part of the supervisory power of the Federal Appellate Courts. See 28 U. S. C. A., §2106. In view of the fact that the disposition of a moot case necessarily involves the exercise of judicial discretion on the part of the Appellate Court, there would appear to be no logical basis for the appellant's inference that, because the Court continues to dismiss appeals as moot, it does so upon the assumption that the form of its order is unimportant because the judgment stands without effect as an instrument of *res judicata* (App. Br., pp. 30-33). There may be numerous reasons which prompt the Appellate Court to dismiss the appeal in the moot case, rather than to vacate the judgment and often the reasons do not appear in the opinion or order. If the Appellate Court acts without proper regard to justice in exercising its discretion, the remedy is by certiorari. *Leader vs. Apex Hosiery Co.*, 302 U. S. 656, and should not be in treating the judgment as void in a collateral proceeding.

Appellant indicates that it may be proper for a party to be deprived of his judgment where mootness on appeal was caused by some fault of the party (App. Br., pp. 21-22; 26-27). We agree. The case of *Heitmuller vs. Stokes*, 256 U. S. 359, occurs to us as an example. There a party to an appeal of an ejectment action ended it by conveying title to the



property in dispute. However, appellant suggests that the issue of fault should be determined in the collateral proceedings where the judgment is tendered as *res judicata* (App. Br., pp. 21-22). We disagree. This would mean that the determination of the question would be transferred from the Appellate Court to a hearing at some indefinite future time in the District Court, or in whatever court the judgment may be tendered as *res judicata*. It might be the Court of the State where rendered, or the Court of some foreign State. This matter of fault can best be determined promptly by the Appellate Court, as is the case under the present practice. See *Leader vs. Apex Hosiery*, 302 U. S. 656, *supra*; *U. S. vs. Hamburg-Amerikanische Co.*, 239 U. S. 466, 477, *supra*; *South Spring Hill Gold Mining Co. vs. The Amador Medean Gold Mining Co.*, 145 U. S. 300, *supra*. The facts or events which may render a case moot must be brought to the attention of the Appellate Court. This is the duty of counsel in order that the Court may not unknowingly exercise authority where it no longer has jurisdiction, and counsel may not waive or stipulate to disregard the point. See *U. S. vs. Alaska Steamship Co.*, 253 U. S. 113, 116; *State of California vs. San Pablo & Tulare R. Co.*, 149 U. S. 308, 314; *Stern & Gressman*, *Supreme Court Practice* (1950 ed.), pp. 339-340. It would seem much more in keeping with sound judicial administration to have the Appellate Court promptly decide which party may have been at fault and to grant relief accordingly, rather than to defer the matter until some indefinite time in the future.

Appellant also refers to a series of letters from Clerks of the Courts of Appeal of the various circuits, saying that they indicate that those Courts do not appear to have followed the practice of eliminating the judgment below in moot appeals (App. Br., p. 33). Whether the Courts of Appeal follow the practice of this Court in an appropriate case is not a matter,

we submit, which should be determined by letters to the Clerks. Rather, the decisions of those Courts should be consulted. Referring to that source, we find positive evidence showing that the Eighth Circuit does follow the practice of this Court where to do so is consonant with justice. *Dakota Coal Co. vs. Frazer* (C. A. 8th), 267 Fed. 130, 135; *Chicago & N. W. R. Co. vs. England* (C. A. 8th), 289 Fed. 783, 785; see *Northwestern Light & Power Co. vs. Town of Milford* (C. A. 8th), 82 F. (2d) 45, and 1023-1024. If the Courts of Appeal neglect to follow the practice in an appropriate case, the proper remedy is to apply here for certiorari. See *Leader vs. Apex Hosiery Co.*, 302 U. S. 656; *Duke Power Co. vs. Greenwood County*, 299 U. S. 259.

Appellant also argues that if dismissal of appeals for mootness results in leaving the judgment standing as an estoppel, the courts would be under pressure to decide controversies without a realistic setting and refers in this connection to *Moore vs. Smith*, 160 Kan. 167, 175, holding that a case is not moot where other justiciable controversies remains between the parties (App. Br., pp. 20-21). The cure in the situation where another justiciable controversy may exist between the parties is for appellant to ask the Court of Appeals to reverse, modify, or vacate the judgment when the appeal becomes moot. In this way, there will be positive evidence in the record to show that the controversy has not been resolved between the parties. The cure does not rest in treating the judgment left standing by dismissal of the appeal as a nullity, in disparagement of those who may rely upon it as a finality. It may be argued that a defeated litigant may not be aware of the fact that he may wish to conduct further litigation against his adversary. This is possible, but quite unlikely. The defeated litigant is more likely to direct his thoughts and those of his lawyer immediately to the problem of further litigation at the time when his lawyer's

attention is directed to the fact that the appeal has become moot.

Appellant argues that §69 (2) of the *American Law Institute, Restatement of the Law of Judgments* is the only fair and logical rule to apply in moot cases such as this one (App. Br., p. 13). However, the *Restatement* appears to be squarely contrary to the decisions of this Court. Under the rule expressed in the *Restatement*, a judgment when tendered in a collateral proceedings as an estoppel under the law of *res judicata* will no longer be entitled to conclusive effect, where it appears that an appeal from the judgment has been dismissed as moot. It means that a judgment which is left standing by dismissal of an appeal becomes void. It will no longer be necessary for litigants to apply to the Appellate Court for the remedy appropriate to the particular facts of the case. The rule of the *Restatement* is very broad and its application quite indefinable. If not strictly confined in its operation, the possibilities for injustice appear numerous. Take a hypothetical example suggested by the case of *Heit-muller vs. Stokes*, 256 U. S. 359. Suppose A brings an ejectment action to recover possession of land from B. A prevails on the ground that his title is superior to B, and B appeals. While appeal is pending, B conveys his color of title to C. When this is brought to the attention of the Appellate Court, the appeal is dismissed as moot, because the Appellate Court can grant no effectual relief to B due to the fact that B has conveyed away whatever rights he may have had in the premises. If C as the successor to B's color of title should later sue the heirs of A to secure possession, it would seem quite unjust to deny conclusive effect to the prior judgment when relied on in the later action. Take an additional hypothetical example suggested by the case of *Sherrier vs. Sherrier*, 334 U. S. 343. Suppose Mr. and Mrs. Brown who live in Massachusetts have marital trouble. Mrs. Brown goes

to Florida and after expiration of the requisite period of residence, she brings a divorce action. Mr. Brown appears in the action and contests it in the trial court. However, Mrs. Brown is granted the decree of divorce which gives her custody of the children and provides for division of property. Mr. Brown takes an appeal. While it is pending, he withdraws his assignments of error and thereby renders the case moot. See *Elwell vs. Fosdick*, 134 U. S. 500; see, also, *Mills vs. Green*, 159 U. S. 651, 654. Sometime later, Mr. Brown brings an action in the Probate Court of Massachusetts, alleging that he is the lawful husband of Mrs. Brown and asking that Court to permit him to convey title to certain real estate covered by the divorce decree, as though he were *sole*. Mrs. Brown joins issue and relies on the decree of the Florida Court as conclusive on the issue whether the bonds of matrimony have been dissolved. Is it just that the decree be treated as a nullity because the case became moot and unreviewable?

These examples, it may be said, show that appellant was at fault in causing the case to become moot, and, therefore, the rule of the *Restatement* should not apply. With this we, of course, agree. However, it would seem more in fitting with sound judicial administration to leave the determination of the question of fault to the Appellate Court which has the case before it, as well as the facts which caused the case to become moot, rather than to leave the matter to the determination of a trial court at some indefinite time in the future.

- C. The validity of a judgment when left standing after an unconditional dismissal of an appeal should not be made to depend upon speculation regarding the appellate court's intention unexpressed in its mandate and judgment.

When a District Court judgment is offered in a subsequent proceedings as conclusive on some issue, its validity, as a conclusive document should not be made to depend on the intention of the Appellate Court, where it had been removed by appeal, which is not clearly expressed in the mandate returning the case to the District Court. The mandate and judgment of the Appellate Court are the documents which become part of the record in the Court below, not the opinion of the Appellate Court. If the judgment of the Appellate Court does not conform to the intention of the Appellate Court expressed in the opinion, it is the function of counsel to apply to correct errors, so that the record does properly conform to the Court's intent. Otherwise, litigants and courts alike would be at sea. How could any one know what had been decided by a Court, if at the time or years afterwards, the record and judgment could not be depended on to reflect the decision of the Court.

In the case at bar, the record in the District Court reflects the findings, the judgment of that Court in the injunction action (R. 36, 41), and appeal, and a mandate from the Court of Appeals which duplicates the judgment of the Court of Appeals (R. 43). The judgment of the Court of Appeals which appears in the record simply recites that two motions were heard, one to dismiss or affirm and the other a motion to dismiss for mootness. It then recites (R. 43):

"On Consideration Whereof, and it appearing that the case has become moot, It is now here Ordered and Adjudged by this Court that the appeal from the said District Court in this cause be, and the same is hereby, dismissed."

If this judgment, in the eyes of appellant upon reading the



opinion, did not reflect what the Court of Appeals intended to effectuate, then, it was appellant's right to apply to that Court or to this Court to correct error in it. Appellant should not be permitted to wait until more than six months after the judgment was rendered to seek to correct the error by collaterally attacking the judgment. Besides, to allow such practice, would be to make the District Court the arbiter of what the Appellate Court had done.

Here, there was an unqualified dismissal of an appeal apparent from the judgment and mandate of the Appellate Court (R. 43). There was no judgment of vacatur, modification, or reversal of the District Court judgment, and there was nothing in the mandate or judgment reserving anything to appellant for future litigation (R. 43). Yet, appellant argues that the practice of vacating the judgment below when an appeal becomes moot is not crucial, but only a formality (App. Br., pp. 28-29). We believe it is crucial. Otherwise, plain mandates from the Appellate Court may be disregarded by the lower courts, depending on whether the lower court believes that the Appellate Court intended something different from what it said in the mandate. The confusion which would arise from such practice can readily be imagined. The confusion arising from the failure to vacate the decree of the lower court in a case which became moot on appeal is illustrated in *Duke Power vs. Greenwood County*, 299 U. S. 259, *supra*.

Appellant argues that this Court and Courts of Appeal continue in some cases to dismiss appeals as moot and claims that, in a number of cases, the circumstances were such as to indicate that no different consequence were to follow from dismissal of the appeal, than from vacatur of the judgment (App. Br., pp. 30-31). Reference is made particularly to *American Book Co. vs. Kansas*, 193 U. S. 49 (App. Br., p. 31), as a case where, it is argued that, patently, the Court

did not intend by dismissal of the appeal to leave the judgment in force as *res judicata*. On the contrary, it seems to us that the Court did there intend to leave the judgment standing as *res judicata* by dismissing the appeal. In that case, the judgment below had been pleaded as *res judicata* in a subsequent action while or before the case was pending on appeal (193 U. S. 49, at 54). Surely, this Court was fully aware of the importance and effect of its mandate. Surely, it could not have expected the State Court of Kansas, from which the appeal had been taken, to treat a dismissal of the appeal as meaning a vacatur of the judgment. The opinion does not disclose why this Court chose to dismiss the appeal, rather than to reverse or vacate the judgment below, as it had done in the *South Spring Hill Gold Mining Co.* case (145 U. S. 300, *supra*). There were, undoubtedly, good and sufficient reasons why the Court decided to dismiss the appeal, quite apart from the assumption suggested by appellant. In the case of *Singer Sewing Machine Co. vs. Wright*, 141 U. S. 696, 700, there is a statement which lends support to appellant's contention, but, as opposed to that case, there are a substantial line of cases where this Court expressly states that dismissal of the appeal for mootness will leave the judgment below standing in force. *South Spring Hill Gold Mining Co. vs. The Amador Medean Gold Mining Co.*, 145 U. S. 300, *supra*; *Board of Flour Inspectors vs. Glover*, 161 U. S. 101, *supra*; *Gulf C. & S. F. R. Co. vs. Dennis*, 224 U. S. 503, 509; *Brownlow vs. Schwartz*, 261 U. S. 216, *supra*; *U. S. vs. Anchor Coal Co.*, 279 U. S. 812, *supra*; see *Oklahoma Gas & Electric Co. vs. Oklahoma Packing Co.*, 292 U. S. 386, *supra*.

Regarding this case, appellant claims that the Court of Appeals for the Eighth Circuit did not intend, by dismissing the appeal, to foreclose relitigation of the same issues common to the injunction and damage cases (App. Br., p. 38). However, his argument is based upon inferences drawn from

the opinion, and does not relate to anything which the Court expressly stated, either in the judgment, mandate, or even the opinion. Appellant's argument in substance is that, because the Court of Appeals pointed out in its opinion that the only case before it was an injunction action and not the damage actions which were being held in abeyance under pre-trial order, it follows that the Court intended to dispose of the injunction case only, and not to adjudicatively affect the damage cases (App. Br., pp. 38-39). On the other hand, other factors should be considered as indicating a contrary intention. The Court of Appeals had heard two motions: one to dismiss or affirm on the ground that the appellant had neglected to assign specific error as required by Court rule, and the other to dismiss for mootness. The Court considered the first motion and said that it should be warranted in affirming on this ground (App. Br., Appendix B, p. 55). Although the Court may not have grounded the dismissal of the appeal on this, nevertheless, it may well have intended to end the litigation because of it. Furthermore, we expressly called the attention of the Court of Appeals in our motion to dismiss as moot to the point that dismissal of the appeal might well affect the issues in the pending treble damage action, as we point out, *infra*, p. 37. However, speculation regarding what may appear as contradictory intentions of the Appellate Court, inferred from the opinion, should not control. The controlling document regarding the Court's intention is the judgment and mandate. If that document did not correctly state the intention of the Court of Appeals, there was opportunity to correct the error in the Court of Appeals or in this Court. Neither course was pursued. It seems to us that what appellant is now trying to do is to reform the mandate of the Court of Appeals in the injunction case by having it read as a vacatur of the judgment instead of a dismissal of the appeal.

Appellant also argues that his claim regarding the inten-

tion of the Court of Appeals is given support by the observation of the dissenting justice that: if respondent at the time of the motion was intending afterwards to claim that the issue of price violation was adjudicatively affected by the Court of Appeals, then, it had no basis for claiming the case was moot and it cannot escape the imputation of misrepresentation (App. Br., p. 39). This observation is unfounded. How could we know at the time of making the motions what the Court of Appeals would do with them? After reading *American Book Co. vs. Kansas*, 193 U. S. 49, supra, it seemed clear to us that the case was moot, notwithstanding the fact that its disposition might affect issues in other litigation. Counsel had the duty to call the Court's attention to the mootness point. See *U. S. vs. Alaska Steamship Co.*, 253 U. S. 113, 116, supra; *State of California vs. San Pablo & Tulare R. Co.*, 149 U. S. 308, 314, supra; *Stern & Gressman*, "Supreme Court Practice" (1950 ed.), pp. 339-340, supra. We performed the duty as best we knew how. In our motion to dismiss ~~which~~ we interposed on the moot ground,<sup>16</sup> we called attention to the treble damage case at pages 4 and 5. We called attention to the fact that the only case tried was the injunction action, and that the only case brought up on appeal was the injunction action (Appellee's Notice and Motion to Dismiss the Appeal, pp. 5-7). We called attention to the rule applicable to moot cases as set forth in decisions of this Court and the Eighth Circuit (*Idem*, pp. 9-11). We also called attention to the fact that dismissal of the appeal might well affect the issues in the pending treble damage action (*Idem*, p. 17, commencing line 7 from bottom of

<sup>16</sup>We have asked that the motion be forwarded to this Court duly certified, and that each member of the Court be provided with a copy.

page).<sup>17</sup> The Court had the duty of deciding the question and disposing of the case on appeal. It chose to dismiss the appeal and the mandate clearly so states. It seems to us that the Court had good and sufficient reason for so doing. If the Court was in error, there was ample opportunity to correct error in the Court of Appeals or here. As we have pointed out, appellant had the opportunity to apply to the Court of Appeals, *Dakota Coal Co. vs. Frazer* (C. A. 8th), 267 Fed. 130, supra; *Chicago & N. W. R. Co. vs. Eveland* (C. A. 8th), 289 Fed. 783, 785, supra, or to this Court for correction of any supposed errors. *Leader vs. Apex Hosiery Company*, 302 U. S. 656, supra. When a judgment, left standing by dismissal of an appeal, is relied on as conclusive in subsequent proceedings, the Court in the subsequent action should not be called upon to read the Appellate Court's mandate as meaning something different from what it stated.<sup>18</sup>

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<sup>17</sup>In our motion to dismiss as moot, we said at p. 10:

"The rule obtains notwithstanding that a dismissal of the appeal may affect other pending cases involving the same parties and similar issues." We followed this by calling attention to *American Book Co. vs. Kansas*, 193 U. S. 49, where it was held that an appeal be dismissed for mootness, although the judgment had been pleaded as conclusive in another case between the same parties. Then, again, on p. 17 of our motion, we said:

"It may well be that the dismissal of this appeal will affect the issues in the pending treble damage actions."

We followed this by pointing out the hardship implicit in this argument and referred to *Rahajet vs. McCambell* (C. A. 2), 55 F. (2d) 221. Was it our duty to go further and ask the Court of Appeals to vacate the judgment which the District Court had rendered in our favor on the merits? We submit that this was not our duty. If appellant, knowing as it must have known, that the dismissal of the appeal would leave the judgment below standing, it was their duty to ask for a vacatur. If appellant wished to continue litigating, it seems to us that it was appellant's duty to ask for a vacatur, not ours.

<sup>18</sup>In a footnote numbered 18 at p. 41 of the appellant's brief, it is suggested that this Court might well have the power to direct a vacatur of the judgment in the injunction action. In this connection, it is pointed out that both the injunction and treble damage count are contained within a single complaint which might well make them sufficiently interrelated to be considered parts of a single proceeding (App. Br. p. 41, footnote No. 1). However, this overlooks the point that the two counts formed separate causes of action, and that there is a decision of the Court of Appeals in the injunction case finding that the two counts stated separate causes of action. *Fleming vs. Munsingwear*, 162 F(2) 125; (see also App. Br., Appendix B, p. 56). This finding was material to the judgment of the Court of Appeals which dismissed the appeal on the moot ground. No appeal was taken from that judgment, and, therefore, the



### III. The Judgments Below Dismissing the Treble Damage Actions Are Supported By the Alternative Ground of Abatement.

- A. The alternative ground based upon abatement of the actions below may be relied upon here to support the judgments.

The judgments of dismissal entered by the District Court on June 2, 1948, and affirmed on November 18, 1949, by the Eighth Circuit are supported by an alternative ground, namely: that the actions had abated by reason of the failure to substitute a proper party plaintiff within the time allowed by law under Rule 25(d) of the Federal Rules of Civil Procedure, or within any time whatsoever. 28 U. S. C. A. following §§2071, 2072; 4 *Moore's Federal Practice* (2d Ed.), Par. 25.09, p. 529.

The abatement of the actions was raised in the District Court as a ground for dismissal in addition to the ground of *res judicata*. The matter came up in this manner. The United

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finding would now conclude the parties from attacking such finding and judgment. See *Angel vs. Bullington*, 330 U. S. 183. The case of *Reed vs. Allen*, 286 U. S. 191, *supra*, presented a similar problem. There petitioner and respondent were parties to an interpleader action, relating to the recovery of rents arising from real estate under the will of one Silas Hohnes. The decree was for petitioner in the trial court, and appeal was taken. While appeal was pending, petitioner brought another action in ejectment to oust respondent from possession of the real estate. In the second action, the decree in the interpleader action was relied upon as conclusive of the vital issue common to both cases, and judgment was given for petitioner. No appeal was taken from the judgment in the ejectment action. Thereafter, the Court of Appeals reversed the judgment in the interpleader action. Respondent then turned around and brought a second ejectment action against petitioner. Petitioner relied on the judgment in the first ejectment action as conclusive, but the Court of Appeals held that judgment to be void on the theory that the ejectment action was merely in aid of the interpleader action. This Court rejected the theory of the Court of Appeals, and reversed. Here, it was pointed out that there were two separate causes of action and, consequently, no power extended over the judgment in the first ejectment action. The same thing would be true in the cases at bar. The injunction cause of action was concluded by a final judgment in the District Court (R. 42). The appeal therefrom was dismissed by the Court of Appeals (R. 43). No certiorari was sought here. It would follow, therefore, that the injunction action had now passed beyond the power of this Court to review and modify. This view is also supported by one of the cases cited by appellant as a "CF." (App. Br. p. 41, footnote 18), namely: *Toledo Scale Co. vs. Computing Scale Co.*, 261 U. S. 399, 417, 418. The other cases, cited by respondent for the proposition that certiorari brought up the injunction action as part of the entire case, are distinguishable. They deal with the situation in general where there is only a single cause of action with different forms of relief administered at different times by the courts below.

States District Attorney served a motion to substitute the United States of America as party plaintiff on January 29, 1948 (R. 66, subpar. c). In response thereto, respondent filed a motion to dismiss on February 3, 1948, upon the ground of estoppel under the law of *res judicata* (R. 64, paragraphs 1 and 2), and upon the ground that the actions had abated for failure to make proper substitutions of a party plaintiff as required by Rule 25(d) (R. 64-66, paragraphs 4 and 5). The District Court overruled respondent's plea in abatement, and ordered substitution of the United States as plaintiff in the place of Paul A. Porter, Administrator of the Office of Price Administration, on April 12, 1948 (R. 56, ff. 118-119).<sup>\*</sup> Thereafter, on May 7, 1948, the District Court heard argument on the *res judicata* ground (R. 52, f. 114), and on June 2, 1948, ordered dismissal of the actions on that ground (R. 52-54).

Although the District Court ruled against respondent on the abatement ground and dismissed the cases on the *res judicata* ground only, nevertheless, respondent is here entitled to rely on the abatement ground to support the judgments below. *U. S. vs. American Railway Express*, 265 U. S. 425, 435-436; *Langnes vs. Green*, 282 U. S. 531, 538; *Story Parchment Company vs. Paterson Parchment Company*, 282 U. S. 555, 568; see *Helvering vs. Gowran*, 302 U. S. 238. In *U. S. vs. American Railway Express Co.*, 265 U. S. 425, *supra*, the respondent (American Express) relied upon grounds which it had raised in the District Court but which that Court had overruled, to support the final judgment in its favor. In holding that such grounds could be relied upon to support the judgment, this Court said:

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<sup>\*</sup>In the District Court, our plea in abatement was grounded upon two reasons: (1) that the failure to substitute Fleming, Administrator of the Office of Temporary Controls, for Porter, Administrator of the Office of Price Administration, caused abatement; and (2) that the Attorney General was the real party in interest and the failure to make his substitution caused the action to abate (R. 64-66).

"\* \* \* it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court, or an insistence upon matter overlooked or ignored by it. By the claims now in question, the American does not attack, in any respect, the decree entered below. It merely asserts additional grounds why the decree should be affirmed. These grounds will be examined."

Furthermore, where a Government official is a party to a pending action and he dies or resigns from office, the failure to make substitution of his successor, as the party to the pending action within the period allowed by law, causes loss of jurisdiction of the Appellate Court, as well as loss of jurisdiction by the Court of first instance. In other words, failure to substitute within the period allowed by law goes to the jurisdiction of the Court. *Defense Supplies Corp. vs. Lawrence Warehouse Co.*, 336 U. S. 631; *U. S. ex rel Claussen vs. Curran*, 276 U. S. 590; see *LeCrone vs. McAdoo*, 253 U. S. 217; *Payne vs. Industrial Board*, 258 U. S. 613.<sup>19</sup>

<sup>19</sup>According to §2105 of the new Judicial Code, (28 U. S. C. A. §2105) it is provided:

"There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction. June 25, 1948, c. 646, 62 Stat. 963."

- B. The various Executive orders transferring the powers of the Office of Price Administration and the Office of Temporary Controls show that the authority to maintain civil actions for treble damages was transferred first to the Administrator of the Office of Temporary Controls and, later, to the Secretary of Commerce.

Supporting abatement, these circumstances are significant in the case at bar. The actions were originally commenced by Chester Bowles, Administrator of the Office of Price Administration, the first action being commenced on June 8, 1944, and the second action about one year later (R. 1, f. 1; R. 44, f. 102). On March 1, 1946, Paul A. Porter, as said Administrator, was substituted plaintiff by District Court order in place of Bowles (R. 56). By Executive Order 9809 issued on December 12, 1946, the Office of Price Administration was consolidated with the Office of War Mobilization and Reconversion, the Office of Economic Stabilization, and the Civilian Production Administration to form one agency, namely, the Office of Temporary Controls, headed by an Administrator who was vested with the powers and functions of the Price Administrator, as well as the powers and functions of the other agency directors (11 F. R. 14281; the text of this Executive Order is attached as Appendix No. 1, *infra*, pp. 64-68). Executive Order 9809, among other things, provided (*infra*, pp. 64-68):

"The functions hereby vested in the Administrator shall be deemed to include the authority to maintain in his own name civil proceedings relating to matters heretofore under the jurisdiction of the price administrator (including any such proceedings now pending)."

On the date of that Executive Order, December 12, 1946, Paul A. Porter resigned as Administrator of the Office of Price Administration (R. 65, subpar. a). On that same date, Philip B. Fleming took office as Administrator of the Office

of Temporary Controls (R. 65, subpar. a). On March 19, 1947, Fleming filed a motion to be substituted as party plaintiff in both pending actions (R. 65, subpar. b). The motion was heard on April 14, 1947, at which time Fleming's counsel advised the Court that it would not be necessary to pass on the motion until the appeal in the injunction action, then pending before the Eighth Circuit, was determined and the judgment reversed (R. 65, subpar. b; R. 71, f. 13—f. 14). Thereafter, the motion was never renewed (R. 72), and Fleming, as Administrator of the Office of Temporary Controls, was never substituted for Porter, as Administrator of the Office of Price Administration.

However, more than nine months after the motion to substitute Fleming was heard, the District Attorney filed the motion to substitute the United States as plaintiff in the place of Porter, that motion being filed on January 29, 1948 (R. 66, subpar. c). In the period which elapsed between the time the motion to substitute Fleming was heard (April 14, 1947), and the time when the motion to substitute the United States was filed (January 29, 1948), changes occurred in regard to the status of the Office of Temporary Controls and the Administrator in charge of that office.

By the Urgent Deficiency Appropriation Act approved March 22, 1947, Congress directed the liquidation of the Office of Temporary Controls by June 30, 1947 (Title II, 61 Stat. at L., Ch. 20). Pursuant to said Act, the President issued Executive Order 9841 on April 23, 1947 (12 F. R. 2645; attached as Appendix No. 2). By Part II of that Order, certain specific functions possessed by the Administrator of the Office of Temporary Controls under Emergency Price Control Act of 1942 and Executive Order 9809, were transferred effective May 4, 1947, to certain agencies and departments, namely: functions relating to rent were transferred to the Housing Expediter, functions respecting price control of



rice to the Secretary of Agriculture, and functions regarding subsidies to the Reconstruction Finance Corporation. (See Sections 201 and 202 of Executive Order 9841, *infra*, Appendix 2, pp. 69-74.) Also, effective May 4, 1947, a long list of functions, possessed by the Temporary Controls Administrator but not related to the Emergency Price Control Act, were transferred to the Secretary of Commerce. (Section 203 of Executive Order 9841, *infra*, Appendix 2, pp. 69-74.) Under Part III of the Order, all functions vested in the Temporary Controls Administrator by Executive Order No. 9809, not otherwise disposed of by statute or by this or other executive order, were transferred to the Secretary of Commerce and required to be performed by him or such officers or agencies as he might designate. (Section 302 of Executive Order 9841, Appendix 2, *infra*, pp. 69-74.) By express mention, the Secretary of Commerce was vested with the liquidation of the functions of the Office of Temporary Controls and the agencies thereof, except liquidations relating to functions specifically transferred to other agencies. (Section 302, subpar. (d) *infra*, Appendix 2, pp. 69-74.) By Section 402 under Part IV of the Order, it was provided that functions under the Emergency Price Control Act transferred by the Order shall be deemed to include "authority on the part of each officer to whom such functions are transferred hereunder to institute, maintain, or defend in his own name civil proceedings in any Court (including the Emergency Court of Appeals), relating to the matters transferred to him, including any such proceedings pending on the effective date of the transfer of any such functions under this order." (Section 402, Executive Order 9841, Appendix 2, *infra*, pp. 69-74.) Functions were defined to include "powers, duties, authorities, and responsibilities" (Section 405, Executive Order 9841, Appendix 2, *infra*, pp. 69-74.) It would appear, therefore, that all powers, duties, authorities, and responsibilities, not otherwise spe-

cifically vested in some other agency, and particularly those having to do with the liquidation of the agencies theretofore consolidated in the Office of Temporary Controls, were to be the responsibility and the job of the Secretary of Commerce. In short, it would appear that he was made the repository of all authorities, duties and responsibilities not expressly transferred to others, including, consequently, the authority to maintain civil actions respecting all Office of Price Administration matters except those pertaining to rent, rice and subsidies.

Section 402 of Executive Order 9841 was made subject to Executive Order 9842 issued by the President on the same date (12 F. R. 2646; Appendix 3, *infra*, pp. 75-76). By paragraph 1 of the Order, the Attorney General was authorized and directed "in the name of the United States or otherwise as permitted by law to coordinate, conduct, initiate, maintain or defend: (a) Litigation before the Emergency Court of Appeals for and on behalf of the Secretary of Agriculture, the Secretary of Commerce, and the Reconstruction Finance Corporation, respectively; (b) Litigation against violators of regulations, schedules, or orders relating to maximum prices pertaining to any commodity which has been removed from price control; (c) Litigation arising out of Directive 41, as amended, of the Office of Economic Stabilization pertaining to the withholding of subsidies, because of the non-compliance with or violations of control orders." (Appendix 3, *infra*, pp. 75-76.)

From analysis of the foregoing Executive Orders, two things would appear: (1) that the authority to maintain civil actions for damages which had been vested by §205(e) of the Emergency Price Control Act of 1942 in Paul A. Porter, Administrator of the Office of Price Administration, was transferred to Philip B. Fleming, Administrator of the Office of Temporary Controls; (2) that the authority to

maintain civil actions for treble damage actions under the Emergency Price Control Act of 1942 was transferred (save only matters relating to rent, rice, and subsidies) by Executive Order No. 9841 to the Secretary of Commerce, and the Attorney General was to furnish the legal and investigatory staff to implement the authority vested in the Secretary of Commerce.

The first proposition appears to be settled by this Court in *Fleming vs. Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, 119, where it was held that Fleming be substituted for Porter.

The second proposition has been passed upon by the Court of Appeals for the Seventh Circuit in *U. S. vs. Allied Oil Corporation*, 183 F. (2d) 453, which holds that the Secretary of Commerce is the successor to the authority of the Administrator of Temporary Controls to maintain civil enforcement actions theretofore vested in Congress in the Administrator of the Office of Price Administration. It rests upon a construction of the Executive Orders and relevant statutory provisions.

Under §205(e) of the Emergency Price Control Act, the authority to maintain treble damage actions was vested in the Administrator of the Office of Price Administration, where the purchase of commodities was not made for use or consumption other than in the course of trade of business, and where the consumer neglected to sue within 30 days from the date of a violation. 50 F. S. C. A., App. §925 (e) (Appendix 4, *infra*, pp. 76-79); see *Bowlex vs. Glick Bros. Lumber Co.* (C. A. 9th), 146 F. (2d) 566, 568, certiorari den. 325 U. S. 877; *Speten vs. Bowlex* (C. A. 8th), 146 F. (2d) 602, 604, certiorari den.; 324 U. S. 877; *Bowlex vs. Seminole Rock & Sand Co.* (C. A. 5th), 145 F. (2d) 482, reversed on other grounds, 325 U. S. 410. By the same Act, Congress vested the power of administration and enforcement in the hands of a

single Administrator who was authorized to hire employees to assist him in carrying out his functions, including authority to employ attorneys "to appear and represent the Administrator in any Court," 50 U. S. C. A., App. §921, (Appendix 4, *infra*, pp. 76-79). Three sanctions were provided by the Act for the enforcement of maximum prices which were to be fixed by regulation of the Administrator (50 U. S. C. A., §902). Criminal prosecution for wilful violators was provided in §205(b) (50 U. S. C. A., App. § 925 (4r) ); injunction actions against violations, or threatened violations by §205 (a) (50 U. S. C. A., App. §925(a) ); and the treble damage action under §205(e) (50 U. S. C. A., App. §925). Due to the length of the various Statutory provisions, they are printed and attached as Appendix 4.

Regarding administration of the criminal sanction, it was provided (50 U. S. C. A., App. §925(d) ) (Appendix 4, *infra*, pp. 76-79) :

"Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be instituted."

Regarding the practice of handling criminal prosecutions, Mr. Thomas I. Emerson, Deputy Administrator in charge of Enforcement of the Office of Price Administration, reported the following to the Committee on Banking and Currency of the House of Representatives, 78th Congress, Second Session, vol. I, H. R. 3376, pp. 154-155 :

"The Department of Justice, of course, handles criminal litigations. We investigate the cases and prepare them for submission to the United States attorneys, and the issue of whether to bring indictment or not, and the conduct of the case from then on is in the Department of Justice."

Regarding the matter of the administration of treble dam-

age actions, Mr. Emerson reported to the same Committee (Hearings, before the Committee on Banking and Currency, House of Representatives, 78th Congress, Second Session, H. R. 4376, vol. 2, p. 2181) :

"Section 205(e) in its present form makes provision for two types of treble damage actions. First, where a sale is made at a price above the legal ceiling to a firm or individual who purchases in the course of trade or business, the Administrator has the right to sue for treble the amount of the overcharge, or \$50, whichever is higher. Second, where a sale above ceiling is made to an individual who purchases for his own private use or consumption, that individual has a similar right of suit for treble the amount of the overcharge, or \$50, whichever is higher. The first is known as the Administrator's treble damage suit; the second as the consumer's treble damage suit."<sup>20</sup>

Regarding the administration of the civil sanctions of injunction and treble damages, the Administrator delegated the authority to his legal staff to institute and conduct civil litigation in *his name* by General Order No. 3, effective September 7, 1944 (9 F. R. 11137, printed and attached as Appendix 5, *infra*, pp. 80-83). The pertinent provision of that Order, provided (Appendix 5, *infra*, pp. 80-83) :

"(a) Institution of and intervention in civil proceedings. The General Counsel or the Acting General Counsel, the Deputy Administrator in Charge of Enforcement, or the Acting Deputy Administrator in Charge of Enforcement, the Director of the Litigation Division or the Acting Director of the Litigation Division, the Regional Enforcement Executives or the Acting Regional Enforcement Executives, the Regional Litigation Attorneys or the Acting Regional Litigation

<sup>20</sup> Congress amended §205(e) of the Emergency Price Control Act on June 30, 1944 (Pub. L. 383, 78th Cong. 2d Session). The amendment did not alter the distinction between the two types of action provided by the 1942 Act. So far as relevant here, however, it may be noted that the Administrator was given the added authority by amendment in 1944 to maintain the consumer treble damage action, if the buyer neglected to bring it within 30 days from the date of the violation (Appendix 4, *infra*, pp. 76-79).



Attorneys, the District Enforcement Attorneys or the Acting District Enforcement Attorneys are each authorized *to institute and/or intervene in, and to conduct appropriate civil actions, or proceedings, in the name of the Price Administrator*; and any of the foregoing may authorize *any other attorney employed by the Office of Price Administration to institute and/or intervene in, and to conduct appropriate civil actions or proceedings in the name of the Price Administrator*. Except as herein provided, no other officer or employee of the Office of Price Administration, whether employed in the principal office in Washington, D. C., or in any regional or field office, has authority to institute or intervene in proceedings on behalf of the Price Administrator." (Italics added.)

It would appear from the foregoing, that while the Emergency Price Control Act was in force, a division of functions was recognized and maintained in practice. The criminal enforcement authority was vested in the Attorney General to maintain in the name of the United States, and the civil enforcement authority was vested in the Administrator to maintain in his name.

In the light of the foregoing division of functions, it would appear to follow that when the President transferred the authority to maintain civil actions of the Administrator of the Office of Price Administration to the Administrator of the Office of Temporary Controls by Executive Order 9809, issued on Dec. 12, 1946 (Appendix 1, *infra*, pp. 64-68), he intended to leave the division theretofore prevailing unchanged. Then, when he later by Executive Order 9841 issued on April 23, 1947 (Appendix 2, *infra*, pp. 69-74), divided up the functions of the Office of Temporary Controls (which had taken over the Office of Price Administration functions) among the several officials and agencies together with the power in these officials and agencies to maintain civil actions, it would seem that he also intended to recognize the division of functions

between the criminal and civil enforcement sanctions. It is true that Executive Order 9841, *supra*, was made subject to Executive Order 9842 issued on the same day (Appendix 3, *infra*, pp. 75-76). However, he did not provide in Order No. 9842 that the Attorney General maintain all litigation against violators in the name of the United States. On the contrary, he provided that litigation against violators be maintained in the name of the United States "or otherwise as permitted by law" (Appendix 2, *infra*, pp. 69-74). Congress having vested the authority to maintain civil actions in the Administrator of the Office of Price Administration and the President having transferred that power to the Office of Temporary Controls and later to the four officials and agencies, it would seem logical to infer that he intended to confer authority on the Attorney General to maintain civil actions in the name of the respective officials to whom he transferred the power. It would also seem logical to infer that, when the legal staff of the Office of Price Administration was disbanded, he intended the Attorney General and the Department of Justice to furnish only the legal and investigation services which had theretofore been furnished by the legal staff of the Office of Price Administration.

The foregoing is supported by a decision of the Seventh Circuit Court of Appeals handed down on July 19, 1950. *U. S. vs. Allied Oil Corporation*, 183 F. (2d) 453, *supra*.<sup>21</sup>

<sup>21</sup>The analysis made by the Seventh Circuit of the relevant Executive Orders of the President and relevant statutes in the *Allied Oil Corporation* case (183 F. (2d) 453, 455-456, *supra*, is as follows:

"The President, says the government, in Executive Order 9842, 50 U. S. C. A., Appendix §925, note, 12 F. R. 2646, effective on the same date as Order 9841, authorized the Attorney General to maintain these suits in the name of the United States. The first order was made subject to the second. By Order No. 9842, the Attorney General was authorized and directed to conduct and maintain price control enforcement litigation in the name of the United States or otherwise as permitted by law. This provision, the government asserts, is a grant of power to the Attorney General to prosecute civil enforcement suits in the name of the United States. Obviously the President could not create new causes of action or vest a new party with a right of action lodged by act of Congress

Although not directly in point, the case of *U. S. vs. Cooper Corporation*, 312 U. S. 600, has a bearing on this problem. The question there was whether the United States could maintain a treble damage action under Section 7 of the Sherman Act, the pertinent provision of which read, "Any person who shall be injured in his person or property, by any other person or corporation by anything forbidden or declared to be unlawful by this act, may sue therefore \* \* \* and shall recover threefold the damages by him sustained" (15 U. S. C. A. §15). In that case, this Court pointed out

in another, that could have been done only by the Congress. It would seem clear then, that a direction by the President to conduct suits in the name of the United States, when Congress had provided that the administrator or his successor should have this right, would be beyond the Executive's power. However, we cannot attribute to the President an intent to override the acts of Congress; indeed we think it clear that he intended the contrary, i.e., to direct that proceedings be in accord with congressional enactments and that he was merely directing that the Department of Justice should furnish the staff of manpower, i.e., legal and investigating personnel, necessary effectively to prosecute 'price control enforcement litigation,' in lieu of conduct of such litigation by the staff of the Office of Price Administration, which had disappeared with repeal of price control; and this, irrespective of whether the suits are criminal, all of which obviously must be brought and prosecuted in the name of the United States, or whether they are civil, to be brought and prosecuted in the manner and in the name of the party 'provided by law.' In other words, the President directed that the Department of Justice should prosecute all enforcement suits in such manner and in such names as Congress had prescribed. Any other conclusion would result in a determination that the Chief Executive transcended his own authority and encroached upon that of the legislative department. This we are unwilling to do, and we are sure that such was not the intent or purport of what he said. Nor was it a 'whim or caprice' upon his part to transfer the function of prosecuting such suits to the Commerce Department, as the government suggests it would have been. On the contrary, this was the exercise of executive discretion, for it was not illogical, when the Office of Price Control was abolished, to transfer its activities to the Department of Commerce, for sales in excess of ceiling prices are a part of commerce. Nor does the fact, if it be a fact, that that department was not staffed with sufficient employees or legal representatives to effectuate enforcement impinge upon the propriety of this conclusion, for it is evident from Order No. 9842 that it was the President's intent that the Department of Justice should, with its investigating and legal staff, perform the necessary enforcement functions involved in prosecuting enforcement litigation. Such, we think, is the order's plain intent. And by Order No. 9841 the litigation was to be prosecuted in the name of the Secretary of Commerce.

"Inasmuch, therefore, as the court was, in view of the acts of Congress, not justified in permitting anyone to prosecute these suits other than the Administrator or his successor, and inasmuch as the President had made the Secretary of Commerce the successor, no one other than that successor could be substituted as plaintiff."

that although the United States is a juristic person in the sense that it has capacity to sue upon contracts made with it or in vindication of its property rights without express statutory authorization, it is not such juristic person with capacity to maintain treble damage actions under a statute creating new rights and remedies. It was also pointed out that whether the United States is vested with the power to maintain such action in the absence of express statutory power depends on the history and purpose of the law. Cf. *Georgia vs. Evans*, 316 U. S. 159, 161. Here, it was the purpose of Congress, as shown by the express provisions of the Price Control Act (§§ 925(a) and (c), U. S. C. A., Tit. 50, supra), to confer authority upon the Administrator of the Office of Price Administration to maintain the civil enforcement remedies. It was not the purpose to confer such power on the United States.

It is correct that §205(e) of the Emergency Price Control did provide that the recovery of damages was to be for the benefit of the United States. There is no question but what the Treasury of the United States is to receive the damages collected in an Administrator's suit for damages. However, this begs the question.<sup>22</sup> The point is: On whom did Congress confer the power to maintain the action for the benefit of the United States. By the Emergency Price Control Act,

<sup>22</sup>In answer to the argument that the United States was the real party in interest authorized to maintain treble damage actions under the Emergency Price Control Act, the Seventh Circuit in *Bowles vs. Wilke*, 175 F(2) 35, 39, said:

"But, in the *Fix* case, (*Fix vs. Philadelphia Barge Co.*, 290 U. S. 530, supra), it could as truly have been said that the United States was the 'real party in interest,' in that any recovery on the bond would have inured to the benefit of the United States and not to the Collector personally. The same is true of most actions brought by an agent or arm of the United States government. In other words, to argue that the Administrator was only a nominal plaintiff; that the United States was the real party in interest, and hence that there was no need for the Administrator's successors to comply with the rule, is to beg the question. The fact remains that the Emergency Price Control Act provided that such actions were to be instituted and maintained by the Administrator, and the plain language of the rule calls for its application to those cases."

the power and authority was given to the Administrator of the Office of Price Administration (§§ 925(a) and (e) of U. S. C. A., Tit. 50, supra), then the President transferred the authority to the Administrator of Temporary Controls (Executive Order 9809, Appendix 1, infra, pp. 64-68); then the President divided the power and assigned it to four agencies and officials (Executive Order 9841, Appendix 2, infra, pp. 69-74). The Secretary of Commerce, as we have pointed out, supra, pp. 44 to 45, has received the power to maintain the present action, because it pertains to fall and winter underwear and not rice, rent or subsidies which were assigned to the other departments and agencies under the order.

It would appear, therefore, upon consideration of the various Executive Orders involving the transfer of functions, that the power and authority to maintain the present treble damage actions was vested in the Secretary of Commerce after Philip B. Fleming, as Administrator of the Office of Temporary Controls, ceased to hold office on June 1, 1947.

C. The failure to substitute either Fleming, as Administrator of the Office of Temporary Controls, for Porter, as Administrator of the Office of Price Administration, or the Secretary of Commerce for Fleming within the six months allowed by Rule 25(d) caused the actions to abate.

As a consequence of the failure to apply for the substitution of Fleming, as Administrator of the Office of Temporary Controls, for Porter, as Administrator of the Office of Price Administration, or, thereafter, the substitution of the Secretary of Commerce for Fleming, the pending actions abated. As to the date when they abated, that would be June 12, 1947, which would be six months after the time when Porter resigned as Administrator of the Office of Price Administration, and was succeeded by Fleming who held office until June 1, 1947. In any view of the matter, however, the time



would expire by Dec. 12, 1947, which would be six months after the Secretary of Commerce succeeded Fleming in power. Such abatement is the import of *Defense Supplies Corporation vs. Lawrence Warehouse Co.*, 336 U. S. 631, and U. S. *ex rel. Claussen vs. Curran*, 276 U. S. 590.

In the *Defense Supplies Corporation* case (336 U. S. 631), *supra*, this Court was concerned with the question whether a judgment entered by the District Court was valid, it being entered during the period when it was lawful to make substitution of the successor to the party plaintiff. The Defense Supplies Corporation originally brought suit against the Lawrence Warehouse to recover damages for the destruction of automobile tires. While the action was pending, the Defense Supplies Corporation was dissolved by joint resolution of Congress and its functions transferred to the Reconstruction Finance Corporation effective July 1, 1945. The joint resolution<sup>23</sup> also provided that "no suit, action, or other proceedings lawfully commenced by or against such corporation shall abate \* \* \*" but the Court, on motion or supplemental petition filed at any time within twelve months after "July 1, 1945, showing necessity for survival, may allow the same to be maintained by or against" Reconstruction Finance Corporation. Within the period of twelve months, the District Court heard the action and entered judgment in favor of Defense Supplies Corporation. In June, 1946, notice of appeal was filed and in December, 1947, the Ninth Circuit affirmed the judgment. Thereafter, it was discovered that Defense Supplies had been dissolved by joint resolution of Congress effective July 1, 1945, and, upon application for rehearing, the Court of Appeals vacated the judgment in favor of Defense Supplies on the ground that the judgment was void when en-

<sup>23</sup>We have taken the text of the joint resolution from the opinion of this Court in the *Defense Supplies Corporation* case (336 U. S. 631, at 635).

tered, because the action had abated upon the demise of Defense Supplies Corporation on July 1, 1945, and was not revived by substitution of Reconstruction Finance Corporation at any time within the 12 months permitted by the joint resolution. This Court reversed, holding that the judgment of the District Court, having been entered during the year when substitution was permissible, was valid when entered in the District Court, although following the expiration of the year period no power to review it existed for want of an essential party to the litigation. In so holding, this Court relied particularly on the language of the joint resolution to the effect that no action lawfully commenced by or against the Defense Supplies Corporation shall abate. It was pointed out in the decision that such language was in substance the same as that in the general substitution statute enacted in 1899, which also provided that the action should not abate during the period allowed by the law for substitution. It was also pointed out that under such language in the 1899 law, this Court held in *LeCrone vs. McAdoo*, 253 U. S. 217 and *Payne vs. Industrial Board*, 258 U. S. 613 that, after expiration of the period for substitution, the Appellate Court had no power to review the merits and simply dismissed the writs of error. However, after the general substitution statute was amended in 1925 and the words, "no action shall abate" were omitted, then, this Court made it unmistakably clear in *U. S. ex rel Claussen vs. Curran*, 276 U. S. 590, that the action abated upon death or resignation of the office holder, and no valid judgment could be entered by the Court of first instance if the action had not been revived within the period allowed by law by the successor in office. As a result of this difference in language, it was pointed out that this Court did not simply dismiss the writ of error, but remanded with direction to vacate the judgment below and to dismiss the complaint.

The conclusion reached in the *Laurence Warehouse* case was also foreshadowed by the dictum in *Fis vs. Philadelphia Barge Co.*, 290 U. S. 530, at 533, where this Court said, in reference to the 1925 statute:

"Revival of the action is necessary because that does not survive the death or resignation of the officer by or against whom it has been brought; but the cause of action may survive, depending on its nature and the applicable rule."

Although the foregoing cases were decided under Act of Congress, we submit that they point the way for the proper construction and application of Rule 25(d). The Rule is the same in substance as the 1925 statute (Act of February 13, 1925, c. 229, § 8, 11, 43 Stat. 941) referred to in the *Laurence Warehouse* case, the main difference being that the six months for substitution provided in the statute begins to run from the date of death or separation from office, whereas, under the Rule, the period begins to run from the date when the successor takes office. 2 *Moore's Federal Practice* (1st Ed.), §25.06, p. 2432. Although the statute was repealed on June 25, 1948, by the revised Judicial Code, Ch. 646, 61 Stat. 994; 4 *Moore's Federal Practice* (2d Ed.), §25.01, §25.09, pp. 503, 509, 529-538, nevertheless, the Rule embodies the same policy as the statute and should be interpreted and applied in the light of the statute. See *Anderson vs. Youngku*, 329 U. S. 482, 485.

**D. A conflict between circuits exists regarding abatement of treble damage actions under the Emergency Price Control Act.**

Our claim that the actions abated and were never revived by the substitution of Porter's successor in office is supported by recent decisions in the Seventh Circuit. *Bowles vs. Wilke* (1949), 175 F. (2d) 35, 38; cert. den. 338 U. S. 861; see *United States vs. Allied Oil Corporation* (1950), 183 F. (2d) 453; see also, *Buck vs. Snyder* (C. A. Dist. of Col.), 179 F. (2d) 466, certiorari granted May 8, 1950, sub. nom. *Snyder vs. Buck*, 94 L. Ed. (Adv.) 723.

Contrary to our position, the Eighth, Ninth and Tenth Circuits hold that there is no need for the Attorney General to apply for the substitution of the successor to the Administrator of the Office of Price Administration, because the actions are not of such character as will abate upon the death or resignation of the public officers charged with the duty to maintain them, and the United States is, and was at all times material, the real party in interest entitled to maintain and carry on treble damage actions commenced by the Administrator of the Office of Price Administration under §205(e) of the Emergency Price Control Act, 50 U. S. C. A. App. §925(e). *U. S. vs. Koike* (C. A. 9th, 1947), 164 F. (2d) 155; *Northwestern Lumber & Shingle Co. vs. U. S.* (C. A. 10th, 1948), 170 F. (2d) 692; *Fleming vs. Goodwin* (C. A. 8th, 1948), 165 F. (2d) 334, cert. den. 334 U. S. 828.

It is the theory of the last two cited cases that Rule 25(d) applies only to actions which abate at common law, that actions brought by a government official in the scope of duties imposed upon him by law do not abate upon the death or resignation of such public officer; that actions which do abate are only those against public officials to compel them personally to discharge some duty imposed by law upon them. In adopting this theory, these Circuit Courts rely on *Thompson vs. U. S.*, 103 U. S. 480; *U. S. ex rel Bernardin vs.*

*Butterworth*, 169 U. S. 600; *Murphy vs. Utter*, 186 U. S. 95; and *Ex Parte La Prade*, 289 U. S. 444, which are cases against various public officials to compel performance of official duties. In the *Thompson* case, *supra*, it was held that a mandamus action to compel a town clerk to place a judgment against the township on record for collection did not abate upon the clerk's resignation from office, because the proceedings was in substance against the township to compel the performance of a continuing public duty irrespective of the incumbent in office. In the *Butterworth* case, *supra*, it was held that a mandamus action to compel the Commissioner of Patents to issue a patent abated upon the death of the Commissioner who was named as the party respondent in the proceedings. In so holding, it was pointed out that the writ of mandamus is a writ which always seeks to enforce the personal obligation of the person to whom it is addressed and does not reach the office. In this case, the Court suggested an act of Congress to prevent abatement of such actions. Congress thereafter enacted a statute, which as we hereinafter point out, was not confined by its terms to actions against public officers acting in their personal as distinguished from their official capacities.<sup>24</sup> In the *Murphy* case, *supra*, it was held that a mandamus action against the Loan Commissioners of the territory of Arizona to compel them to accept certain county bonds and issue refunding bonds did not abate upon resignations of individual members, because the Loan Commissioners was a governmental body in the nature of a corporation vested by law with continuing duties, irrespective of

<sup>24</sup>In dealing with *Thompson vs. U. S.*, 103 U. S. 480, this Court said in the *Butterworth* case:

"In *Thompson vs. United States*, 103 U. S. 480, the distinction is pointed out between proceedings where the obligation sought to be enforced devolves upon a corporation or continuing body, and those where the duty is personal to the officer. In the former case there is no abatement. The duty is perpetual upon the corporation; in the latter, the delinquency charged is personal, and involves no charge against the government, against which a proceeding would not lie."



the incumbents. In the case of *Ex Parte La Prade*, supra, it was held that an action to enjoin the Attorney General of Arizona from enforcing an alleged unconstitutional state statute abated upon the resignation of the incumbent against whom the action was instituted, for the reason that the threatened action to enforce an unconstitutional statute was personal in character, and, in the absence of a showing that his successor threatened to enforce the alleged unconstitutional law, the lower court properly refused to make substitution of the successor to the office in the pending action under the Act of February 8, 1899, Ch. 121, 30 Stat. at L. 822 as amended on February 13, 1925, Ch. 229, §11(a), 43 Stat. at L. 941, 28 U. S. C. A. §780. There appears to be no doubt but what this Court in the cases cited recognizes a distinction in actions brought against officials of municipal bodies or governmental bodies of a corporate and continuing character. Where the object of the action is to compel the person occupying office to perform a non-discretionary duty imposed upon him by law, the action is regarded as personal in character and it, therefore, abates on death or resignation of the government officer. Where the object of the action is to compel a governmental body in the nature of continuing corporate organizations to discharge duties imposed on it by law, the action does not abate because the governmental body is a continuing thing with continuing duties.

However, these cases do not deal with the situation where the public official may be exercising personal discretion in the performance of a discretionary duty. In the case where the public officer acts in the performance of a discretionary duty, his action partakes of a personal as well as an official character. The type of duty involved here would seem to us to be an official duty the exercise of which is discretionary, not mandatory. Whether the Administrator should bring any particular civil enforcement action would be within the per-

sonal discretion of the Administrator, and could not, it would seem, be compelled by mandamus. See and Cf. *Ex Parte La Prade*, 289 U. S. 444, 458.

When Congress enacted the law of February 8, 1899 (30 Stat. 822, Ch. 121, Appendix 6, *infra*, p. 83), at the suggestion of this Court in the *Butterworth* case, it expressly applied to actions by or against the officer in relation to the discharge of his official duties.<sup>25</sup> If it were true that actions by or against an officer in relation to his official duties did not abate at common law, then, it is surprising that Congress should expressly cover such actions in the statute which was designed to cure the problem created by the common law. If only personal actions against public officials abated, then furthermore, it is surprising that Congress covered both actions by and against public officials in their official capacities.

When the Act of February 8, 1899, was amended on February 13, 1925 (43 Stat. 941, Ch. 229) (Appendix 7, *infra*, pp. 84-85), it is also noteworthy that the language saving actions by or against public, provided again to cover actions relating to the discharge of their official duties.<sup>26</sup> We doubt that Con-

<sup>25</sup>The wording of the Act of February 8, 1899 (30 Stat. 822, Ch. 121, Appendix 6, *infra*, p. 83) was as follows:

"Be it enacted . . . That no suit, action, or other proceeding lawfully commenced by or against the head of any Department or Bureau or other officer of the United States in *his official capacity, or in relation to the discharge of his official duties*, shall abate by reason of his death, on the expiration of his term of office, or his retirement, or resignation, or removal from office, but, in such event, the Court, on motion or supplemental petition filed, at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office . . . [Feb. 8, 1899] 30 Stat. 822, c. 121." (Italics added.)

<sup>26</sup>The text of the Act of February 13, 1925 (43 Stat. 936) read (Appendix 7, *infra*, pp. 84-85):

"Be it enacted . . . Sec. 11(a). That where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, *and relating to the discharge of his official duties*, such officer dies, resigns,

gress for a second time intended to provide for perpetuating actions which survived without any statute. Rule 25(d) does not continue the phrase relating to official duties. The pertinent language of Rule 25(d) reads (following §§ 2071, 2072, 28 U. S. C. A., *supra*) :

"When an officer of the United States \* \* \* is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued *by or against* his successor, if within six months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it." (Italics added.)

The language of the rule, however, is broad. It is not restricted by its text to actions brought against public officials, nor is it limited to actions by or against officials in their personal, as distinguished from their official, capacities. If such were the case, it would be applicable in a very limited number of cases, such as mandamus or mandatory injunction suits against public officials to compel performance of some non-discretionary duty. In view of the fact that Rule 25(d) now supplants the statute on the subject (28 U. S. C. A. §780), it should be construed to carry out the policy of repose under the statute. See *Anderson vs. Youngku*, 329 U. S. 428, *supra*. Under the 1925 Act, this Court recognized that an action by a public official abates and must be revived by his successor within the statutory period, although the cause of action may survive. *Fir vs. Philadelphia Burge Co.*, 290 U. S. 530, 533. In *Defense Supplies Corporation vs. Lawrence Warehouse*, 336 U. S. 631, *supra*, this Court had before it as a preliminary

or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved." [Feb. 13, 1925] 43 Stat. 936, 541, c. 229. (Italics added.)

question: whether the Reconstruction Finance Corporation could be substituted as the party respondent in the place of the Defense Supplies Corporation in the appeal of an action brought by the Defense Supplies Corporation against the Lawrence Warehouse. It appeared that the substitution was sought in the Court of Appeals after the one-year period, provided by the joint resolution of Congress, had expired. In holding that the Court of Appeals correctly denied the motion to substitute, this Court said:

"We do not think Congress intended a gesture of futility when it stated a twelve-month period for substitution."

This Court so held; notwithstanding the argument of the Solicitor General that the joint resolution of Congress did not require substitution of the successor corporation, because the action involved a continuing duty of the public office, rather than the personal performance of the individual officer, and that the suit was instituted by Defense Supplies in its capacity as representative of the United States, and in no sense a personal suit. (See the argument as reported in 93 L. Ed. 931 at 932-933.) If the proposition so argued had been accepted here, then, there could be no objection to substitution after the period of twelve months provided by the joint resolution, because the matter would not involve a question of abatement but only a formal amendment of the title of the action to bring in the Government as the real party in interest, as was held in *Porter vs. Goodwin* (C. A. 8th), 165 F. (2d) 334, *supra*.

In *Bowlex vs. Wilke*, 175 F. (2d) 35, 39, the Seventh Circuit, after considering the decision in *Reconstruction Finance Corporation vs. Lawrence Warehouse Co.* and statement above quoted of this Court, said:

"In the face of this pronouncement, we are not justified in saying that the six months substitution provision was intended as a gesture of futility. The rule

clearly applied, it was not complied with, and so the action abated. *Bowles vs. Ohlhausen*, D. C. Ill., 71 F. Supp. 199; *Bowles vs. Seigel*, D. C. D. C., 7 F. R. D. 331; *Bowles vs. Mittleman, Co.*, 191 P. (2d) 372."

In the case at bar, the only party authorized to maintain the treble damage actions was first, Philip B. Fleming, as Administrator of the Office of Temporary Controls, upon the resignation of Paul A. Porter, Administrator of the Office of Price Administration, on December 12, 1946. Fleming's substitution was required within the six-months period prescribed by Rule 25(d). In any event, the Secretary of Commerce should have been substituted within the period of six months following the resignation of Fleming on June 1, 1947. He has never been substituted as the party plaintiff, and, it is, therefore, submitted that the actions have abated.

### CONCLUSION

For the foregoing reasons, respondent respectfully submits that the judgments below be affirmed.

Respectfully,

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## APPENDIX 1

No. 9809

11 F. R. 14281

PROVIDING FOR THE DISPOSITION OF CERTAIN  
WAR AGENCIES

By virtue of the authority vested in me by the Constitution and statutes, including Title I of the First War Powers Act, 1941,<sup>1</sup> Title III of the Second War Powers Act, 1942,<sup>2</sup> section 201 (b) of the Emergency Price Control Act of 1942, as amended,<sup>3</sup> and section 2 of the Stabilization Act of 1942,<sup>4</sup> and as President of the United States, it is hereby ordered, for the purpose of further effectuating the transition from war to peace and in the interest of the internal management of the Government, as follows:

1. Except as otherwise provided in this order, the following agencies and their functions are consolidated to form one agency in the Office for Emergency Management of the Executive Office of the President, which shall be known as the Office of Temporary Controls, namely: the Office of War Mobilization and Reconversion, the Office of Economic Stabilization, the Office of Price Administration, and the Civilian Production Administration. Consistent with applicable law, the Office of Temporary Controls shall be organized and its functions shall be administered in such manner as the head thereof may deem desirable.

2. There shall be at the head of the Office of Temporary Controls a Temporary Controls Administrator, hereafter referred to as the Administrator, who shall be appointed by the President and who shall receive a salary at the rate of \$12,000

<sup>1</sup>50 U. S. C. A. Appendix, §§601-605.

<sup>2</sup>50 U. S. C. A. Appendix, §§633, 1152.

<sup>3</sup>50 U. S. C. A. Appendix, §921.

<sup>4</sup>50 U. S. C. A. Appendix, §962.

per annum unless the Congress shall otherwise provide. Except as otherwise provided in this order, the functions of the Director of War Mobilization and Reconversion, the Economic Stabilization Director, the Price Administrator, and the Civilian Production Administrator, including such functions of the President as are now administered by the said officers, are vested in the Administrator. The functions hereby vested in the Administrator shall be deemed to include the authority to maintain in his own name civil proceedings relating to matters heretofore under the jurisdiction of the Price Administrator (including any such proceedings now pending).

3. (a) The advisory board provided for in section 102 of the War Mobilization and Reconversion Act of 1944<sup>5</sup> and its functions, which shall remain vested in such board, are transferred to the Office of Temporary Controls.

(b) The Economic Stabilization Board (transferred to the Office of War Mobilization and Reconversion by Executive Order No. 9762 of July 25, 1946<sup>6</sup>) and its functions are terminated.

4. The functions of the Director of War Mobilization and Reconversion under subsections (c) (1), (c) (2), (c) (3), and (c) (4) of section 101 of the War Mobilization and Reconversion Act of 1944<sup>7</sup> are transferred to the President.

5. The functions of the Director of War Mobilization and Reconversion under the provisions of Executive Order No. 9568<sup>8</sup> of June 8, 1945, and of Executive Order No. 9604<sup>9</sup> of August 25, 1945 (with respect to the declassification, release, and publication of certain technical, scientific, and industrial information which has been classified as secret, confidential,

<sup>5</sup>50 U. S. C. A. Appendix, §1652.

<sup>6</sup>U. S. Code Cong. Service 1946, p. 5-83.

<sup>7</sup>50 U. S. C. A. Appendix, §1651.

<sup>8</sup>50 U. S. C. A. Appendix, §1651 note.

or restricted), are transferred to the Secretary of Commerce.

6. The functions of the Director of War Mobilization and Reconversion under the provisions of Executive Order No. 9791<sup>9</sup> of October 17, 1946 (with respect to the study of scientific research and development activities), are transferred to the Executive Office of the President and shall be administered therein as the President may determine.

7. The functions of the Media Programming Division and the Motion Picture Division of the Office of War Mobilization and Reconversion, and the functions which were transferred from the Bureau of Special Services of the Office of War Information to the Bureau of the Budget by the provisions of paragraph 1 (b) of Executive Order No. 9608<sup>10</sup> of August 31, 1945, are transferred to the Office of Government Reports, which is re-established as an agency in the Executive Office of the President on the same basis and with the same functions as obtained immediately prior to the promulgation of Executive Order No. 9182 of June 13, 1942. The functions of the Director of War Mobilization and Reconversion with respect to the functions of the said Divisions and the functions of the Director of the Bureau of the Budget with respect to the said functions of the Bureau of the Budget are transferred to the Director of the Office of Government Reports.

8. There are transferred to the Department of the Treasury (a) the functions of the Office of Contract Settlement, (b) the Appeal Board established under section 13(d) of the Contract Settlement Act of 1944,<sup>11</sup> (c) the Contract Settlement Advisory Board created by section 5<sup>12</sup> of the said Act, and (d) the functions of such boards, which shall remain vested therein, respectively. The functions of the Direc-

<sup>9</sup>U. S. Code Cong. Service 1946, p. 5, 106.

<sup>10</sup>50 U. S. C. A. Appendix, §601 note.

<sup>11</sup>41 U. S. C. A. §113.

<sup>12</sup>41 U. S. C. A. §105.

tor of Contract Settlement, and the functions of the Director of War Mobilization and Reconversion under section 101(b) of the War Mobilization and Reconversion Act of 1944 with respect to the Office of Contract Settlement, are transferred to the Secretary of the Treasury.

9. The functions of the Financial Reporting Division of the Office of Price Administration, together with the functions of the Price Administrator with respect thereto, are transferred to the Federal Trade Commission.

10. (a) The National Wage Stabilization Board is terminated.

(b) The functions heretofore vested in the National Wage Stabilization Board pursuant to the provisions of section 5 (a) of the Stabilization Act of 1942,<sup>13</sup> as amended, are transferred to the Department of the Treasury.

(c) The functions under section 5 of the War Labor Disputes Act<sup>14</sup> now vested in the National Wage Stabilization Board shall be administered by a special board or boards to be constituted as may be necessary by the Secretary of Labor from among the members of a panel to be appointed by the President for that purpose.

(d) The tripartite Steel Commission (created by the National War Labor Board on March 30, 1945) shall continue to carry out its functions within the Department of Labor until such date as the Secretary of Labor may fix for its termination.

(e) All other functions of the National Wage Stabilization Board are transferred to the Secretary of Labor.

11. The authority, records, property, and personnel which relate primarily to the functions redistributed by this order are transferred to the respective agencies in which functions

<sup>13</sup>50 U. S. C. A. Appendix, §965.

<sup>14</sup>50 U. S. C. A. Appendix, §1505.

are vested pursuant to the provisions of this order and the funds which relate primarily to such functions are transferred or otherwise made available to such respective agencies: *Provided*, that the Director of the Bureau of the Budget may in any case limit the records, property, personnel, and funds to be so transferred or made available to so much thereof as he deems to be required for the administration of the transferred functions: Such further measures and dispositions as may be determined by the Director of the Bureau of the Budget to be necessary to effectuate the purposes and provisions of this paragraph shall be carried out in such manner as the Director of the Bureau of the Budget may direct and by such agencies as he may designate. All personnel transferred under the provisions of this order which the transferee agencies shall respectively find to be in excess of the personnel necessary for the administration of the functions transferred to such agencies by this order shall, if not retransferred, under existing law to other positions in the Government, be separated from the service.

12. All prior Executive orders or parts thereof in conflict with this order are amended accordingly. All other prior orders, regulations, rulings, directives, and other actions relating to any function or agency transferred by this order or issued by any such agency shall remain in effect except as they are inconsistent herewith or are hereafter amended or revoked under proper authority.

13. The provisions of this order shall become effective immediately except that the provisions of paragraph 10 hereof, and those of paragraph 11 to the extent that they relate to the functions referred to in paragraph 10, shall become effective on February 24, 1947.

HARRY S. TRUMAN

THE WHITE HOUSE  
December 12, 1946.



## APPENDIX 2

No. 9841

12 F. R. 2645

## TERMINATION OF THE OFFICE OF TEMPORARY CONTROLS

WHEREAS the Congress, in the Urgent Deficiency Appropriation Act, 1947,<sup>1</sup> approved March 22, 1947, has declared its intent that the Office of Temporary Controls be closed and liquidated by June 30, 1947; and

WHEREAS it is necessary to provide for the orderly liquidation of such Office and ~~the disposition~~ of its residual affairs:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and Statutes, including the last paragraph of Title I of the First Supplemental Surplus Appropriation Rescission Act, 1946,<sup>2</sup> approved February 18, 1946, Title III of the Second War Powers Act, 1942,<sup>3</sup> as amended by the First Decontrol Act of 1947,<sup>4</sup> section 201(b) of the Emergency Price Control Act of 1942, as amended,<sup>5</sup> section 2 of the Stabilization Act of 1942, as amended,<sup>6</sup> and Title I of the First War Powers Act, 1941,<sup>7</sup> and as President of the United States, it is hereby ordered, in the interest of the internal management of the Government, as follows:

## PART I

101. The Office of Temporary Controls, established by Executive Order No. 9809 of December 12, 1946, shall be

<sup>1</sup>U. S. Code Cong. Service 1947, p. 14.

<sup>2</sup>42 U. S. C. A. §1543.

<sup>3</sup>50 U. S. C. A. Appendix, §§633, 1152.

<sup>4</sup>50 U. S. C. A. Appendix, §§633 note, 645.

<sup>5</sup>50 U. S. C. A. Appendix, §921(b).

<sup>6</sup>50 U. S. C. A. Appendix, §962.

<sup>7</sup>50 U. S. C. A. Appendix, §§601-605.

terminated and disposition shall be made of its functions according to the provisions of this order.

## PART II

201. The provisions of this Part shall become effective on May 4, 1947.

202. Functions of the Temporary Controls Administrator under the Emergency Price Control Act of 1942, as amended, Executive Order No. 9809,<sup>8</sup> and any other statute, order, or delegation are transferred as follows:

(a) Functions with respect to rent control are transferred to the Housing Expediter and shall be performed by him or, subject to his direction and control, by such officers or agencies of the Government as he may designate.

(b) Functions with respect to price control over rice are transferred to the Secretary of Agriculture and shall be performed by him or, subject to his direction and control, by such officers or agencies of the Department of Agriculture as he may designate.

(c) Functions with respect to (1) subsidies, including determinations of the correct amounts of claims and the recovery of over-payments (but excluding premium-payment functions transferred under paragraph 302(b) hereof); (2) applications for price adjustments filed under Supplementary Order 9 and Procedural Regulation 6 (Adjustment of Maximum Prices for Commodities and Services under Government Contracts or Subcontracts, 7 F. R. 5087, 5444) of the Office of Price Administration; and (3) the interpretation and application of price and subsidy regulations and orders which affect the amount of subsidy payable, are transferred to the Reconstruction Finance Corporation.

<sup>8</sup>U. S. Code Cong. Service 1946, p. 1877.

203. The following functions of the Temporary Controls Administrator are transferred to the Secretary of Commerce and shall be performed by him or, subject to his direction and control, by such officers and agencies of the Department of Commerce as he may designate.

(2) Functions of the President under Title III of the Second War Powers Act, 1942, as amended, vested in the Temporary Controls Administrator immediately prior to the taking of effect of this Part.

(b) Functions with respect to determining, under section 6(a) of the Strategic and Critical Materials Stockpiling Act,<sup>9</sup> the amount of strategic and critical materials necessary to make up any deficiency of the supply thereof for the current requirements of industry.

(c) Functions under section 124 of the Internal Revenue Code, as amended.<sup>10</sup>

(d) Functions under section 12 of the act of June 11, 1942 (the Small Business Mobilization Act).<sup>11</sup>

(e) Functions with respect to claims relating to the expansion of the capacity of defense plants when such expansion is alleged to have been undertaken at the request of the War Production Board or any of its predecessor agencies.

(f) Functions with respect to claims relating to property requisitioned by the Chairman of the War Production Board or by any of his predecessors.

(g) Except as otherwise provided by statute or this or any other Executive order, all other functions of the Temporary Controls Administrator which were immediately prior

<sup>9</sup>50 U. S. C. A. Appendix, §98e.

<sup>10</sup>26 U. S. C. A. §124.

<sup>11</sup>50 U. S. C. A. Appendix, §1112.

to the taking of effect of Executive Order No. 9809 vested in the Civilian Production Administrator.

204. Executive Order No. 9705 of March 15, 1946<sup>12</sup> (as modified by Executive Orders Nos. 9762<sup>13</sup> and 9809) is revoked.

205. Any authority vested in the Temporary Controls Administrator in pursuance of section 120 of the National Defense Act of 1916<sup>14</sup> (with respect to placing compulsory orders for products or materials) is withdrawn and terminated.

### PART III

301. The provisions of this Part shall become effective June 1, 1947.

302. All functions vested in the Temporary Controls Administrator by Executive Order No. 9809 not otherwise disposed of by Statute or by this or any other Executive Order are transferred to the Secretary of Commerce and shall be performed by him or, subject to his direction and control, by such officers or agencies of the Department of Commerce as the Secretary may designate. Such functions shall include, but not be limited to, the following:

(a) Functions of the President under the Stabilization Act of 1942, as amended,<sup>15</sup> vested in the Temporary Controls Administrator immediately prior to the taking of effect of this Part.

(b) Functions with respect to premium payments under section 2 (c) (a) (2) of the Emergency Price Control Act of

<sup>12</sup> 7 U. S. C. A. §141 note.

<sup>13</sup> 50 U. S. C. A. Appendix, §901 note.

<sup>14</sup> 50 U. S. C. A. §80.

<sup>15</sup> 50 U. S. C. A. Appendix, §§901, 961-971.

1942, as amended,<sup>16</sup> in so far as such payments relate to copper, lead, and zinc ores.

(c) Functions with respect to the establishment of maximum prices for industrial alcohol sold to the Government or its agencies.

(d) The liquidation of the functions of the Office of Temporary Controls and of the agencies thereof, except liquidation relating to functions specifically transferred to other agencies (by the provisions of this order or otherwise).

303. The Office of Temporary Controls is terminated.

#### PART IV

401. The provisions of this Part shall become effective, respectively, on the dates on which functions are transferred or otherwise vested by the provisions of this order.

402. Functions under the Emergency Price Control Act of 1942, as amended, transferred under the provisions of this order shall be deemed to include authority on the part of each officer to whom such functions are transferred hereunder to institute, maintain, or defend in his own name civil proceedings in any court (including the Emergency Court of Appeals), relating to the matters transferred to him, including any such proceedings pending on the effective date of the transfer of any such function under this order. The provisions of this paragraph shall be subject to the provisions of the Executive order entitled "Conduct of Certain Litigation Arising under Wartime Legislation," issued on the date of this order and effective June 1, 1947.

403. (a) The records, property, and personnel relating primarily to the respective functions transferred under the provisions of this order shall be transferred, and the funds

<sup>16</sup>50 U. S. C. A. Appendix, §902.



relating primarily to such respective functions shall be transferred or otherwise made available, to the agencies to which such functions are transferred. Such measures and dispositions as may be determined by the Director of the Bureau of the Budget to be necessary to effectuate the purposes and provisions of this paragraph shall be carried out in such manner as the Director may determine and by such agencies as he may designate.

(b) In order that the confidential status of any records affected by this order shall be fully protected and maintained, the use of any confidential records transferred hereunder shall be so restricted by the respective agencies as to prevent the disclosure of information concerning individual persons or firms to persons who are not engaged in functions or activities to which such records are directly related, except as provided for by law or as required in the final disposition thereof pursuant to law.

404. All provisions of prior Executive orders in conflict with this order are amended accordingly. All other prior and currently effective orders, rules, regulations, directives, and other similar instruments relating to any function transferred by the provisions of this order or issued by any agency terminated hereunder or by any predecessor or constituent agency thereof, shall remain in effect except as they are inconsistent herewith or are hereafter amended or revoked under proper authority.

405. As used in this order, "functions" includes powers, duties, authorities, discretions, and responsibilities.

HARRY S. TRUMAN

THE WHITE HOUSE,

April 23, 1947.

**APPENDIX 3****No. 9842****12 F. R. 2646****CONDUCT OF CERTAIN LITIGATION ARISING UNDER  
WARTIME LEGISLATION**

By virtue of the authority vested in me by the Constitution and Statutes, including Title I of the First War Powers Act, 1941,<sup>17</sup> and as President of the United States, and having regard to the established responsibilities and powers of the Department of Justice and of the Attorney General under the Statutes of the United States, it is hereby ordered, in the interest of the internal management of the Government, as follows:

1. The Attorney General is authorized and directed, in the name of the United States or otherwise as permitted by law, to coordinate, conduct, initiate, maintain or defend:

(a) Litigation before the Emergency Court of Appeals for and on behalf of the Secretary of Agriculture, the Secretary of Commerce, and the Reconstruction Finance Corporation, respectively;

(b) Litigation against violators of regulations, schedules or orders relating to maximum prices pertaining to any commodity which has been removed from price control;

(c) Litigation arising out of Directive 41, as amended, of the Office of Economic Stabilization pertaining to the withholding of subsidies because of non-compliance with or violations of control orders.

2. Nothing herein shall be deemed to restrict or limit the powers conferred upon the Attorney General by law with respect to the conduct, settlement, disposition or review of litigation.

3. The functions and duties of the Attorney General under this order shall be performed by him or, subject to his direction and control, by such officers or agencies of the Department of Justice as he may designate, and there shall be made available to the Attorney General, pursuant to the provisions of Executive Order No. 9784 of September 25, 1946,<sup>18</sup> any files or records pertinent to the subject matter hereof.

4. This order shall become effective June 1, 1947.

HARRY S. TRUMAN

THE WHITE HOUSE,  
April 23, 1947.

#### APPENDIX 4

Applicable provisions of the Act creating the Office of Price Administration. Act of January 30, 1942, c. 26, Title II, §§201, 205, Stat. 33, as amended by Act, June 30, 1944, c. 325, Title I, §§104, 108, 58 Stat. 640, and Act, July 25, 1946, c. 671, §§12, 13, 60 Stat. 676, 677, and Act, July 30, 1947, c. 361, Title I, §101, 61 Stat. 619:

##### §921. Administration.

"(a) There is hereby created an Office of Price Administration, which shall be under the direction of a Price Administrator (referred to in this Act as the 'Administrator'). The Administrator shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate of \$12,000 per annum. The Administrator may, subject to the civil-service laws, appoint such employees as he deems necessary in order to carry out his functions and duties under this Act, and shall fix their compensation in accordance with the Classification Act of 1923, as amended [Title 5, §§661-673, 674]. The Administra-

<sup>18</sup>44 U. S. C. A. §371 note.

tor may utilize the services of Federal, State, and local agencies and may utilize and establish such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may appear for and represent the Administrator in any case in any court. In the appointment, selection, classification, and promotion of officers and employees of the Office of Price Administration, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency.

#### §925. Enforcement.

"(a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act (section 904 of this Appendix), he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

"(b) Any person who willfully violates any provision of section 4 of this Act (section 904 of this Appendix), and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202 (sections 902 or 922 of this Appendix), shall, upon conviction thereof, be subject to a fine of not more than \$5,000; or to imprisonment for not more than two years in the case of a violation of section 4(c) (section 904(c) of this Appendix) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

“(e) If any person selling a commodity violates a regulation, order or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In any action under this subsection, the seller shall be liable for reasonable attorneys fees and costs as determined by the court, plus whichever of the following sums is greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than \$25 nor more than \$50; as the Court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word ‘overcharge’ shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under



this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

"The Administrator may not institute any action under this subsection on behalf of the United States, or, if such action has been instituted, the Administrator shall withdraw the same—

"(1) if the violation arose because the person selling the commodity acted upon and in accordance with the written advice and instructions of the Administrator or any regional administrator or district director of the Office of Price Administration; or

"(2) if the violation arose out of the sale of a commodity to any agency of the Government, or to any public housing authority whose operations are supervised or financed in whole or in part by any agency of the Government, and such sale was made pursuant to the lowest bid made in response to an invitation for competitive bids.

"The Administrator shall not institute or maintain any enforcement action under this subsection against any manufacturer of apparel items where the Administrator shall determine (1) that the transactions on which such proceeding is based consisted of the manufacturer's selling such an item at his published March, 1942, price list prices instead of his March, 1942, delivered prices, and (2) that the seller's customary pricing patterns for related apparel items would be distorted by a requirement that his ceilings be the March, 1942, delivered prices. The Administrator shall not be required to make any determination under this section unless the manufacturer makes application to the Administrator for such determination within sixty days after the date of this enactment, or within sixty days after institution of the enforcement action in which such manufacturer is involved, whichever is the later. The Administrator's determinations under this paragraph shall be subject to review by the Emergency Court of Appeals in accordance with sections 203 and 204 (Sections 923 and 924 of this Appendix).

**APPENDIX 5**

General Order No. 3: Representation of administrator in court proceedings. C. F. R., Title 32, Ch. 11, Part 1305. Issued March 20, 1942, effective June 27, 1942, Federal Register, March 24, 1942. See Effective Date section for recapitulation of amendments and sections affected thereby.

**[Text of Order]**

Pursuant to the authority conferred upon the Price Administrator by the Emergency Price Control Act of 1942, as amended, the Act of June 28, 1940, as amended and Executive Orders 9125, 9250, 9280, and 9328, the following order is prescribed:

(a) *Institution of and intervention in civil proceedings.* The General Counsel or the Acting General Counsel, the Deputy Administrator in Charge of Enforcement, or the Acting Deputy Administrator in Charge of Enforcement, the Director of the Litigation Division or the Acting Director of the Litigation Division, the Regional Enforcement Executives or the Acting Regional Enforcement Executives, the Regional Litigation Attorneys or the Acting Regional Litigation Attorneys, the District Enforcement Attorneys or the Acting District Enforcement Attorneys are each authorized to institute and/or intervene in, and to conduct appropriate civil actions or proceedings, in the name of the Price Administrator; and any of the foregoing may authorize any other attorney employed by the Office of Price Administration to institute and/or intervene in, and to conduct appropriate civil actions or proceedings in the name of the Price Administrator. Except as herein provided, no other officer or employee of the Office of Price Administration, whether employed in the principal office in Washington, D. C., or any regional or field office, has authority to institute or intervene in proceedings on behalf of the Price Administrator.

The Price Administrator does hereby ratify, approve and confirm all acts done and all proceedings had or taken by an attorney-at-law regularly admitted to practice in any state, territory, or district, purporting to act in the name of or on behalf of the Price Administrator in any suit, action or proceeding heretofore at any time brought or purporting to be brought by the Price Administrator in any court of the United States or of any state, territory or district, said ratification, approval and confirmation to have the same force and effect as if specific authority to institute and conduct such suit, action or proceeding had been expressly granted by the Price Administrator to such attorney immediately prior to the commencement of such suit, action or proceeding. Without in any manner limiting the generality of the foregoing, the Price Administrator does hereby ratify, approve and confirm all acts done and all proceedings had or taken by any such attorney in instituting, maintaining and prosecuting any and all suits, actions and proceedings of whatsoever nature heretofore at any time brought or purporting to be brought in the name of the Price Administrator under the provisions of Section 205(a) of the Emergency Price Control Act of 1942, to enjoin violations of said Act or any order, schedule or regulation thereunder, or under the provisions of section 205(e) of said Act as originally enacted, or as amended, to enforce any liability created by said section, or under the provisions of section 205(f) of said Act to revoke the license of any person licensed under said Act, or under section 202 of said Act to enforce compliance or obedience to any subpoena, order or requirement issued or purporting to be issued under said section, or under subdivision 6 of subsection (a) of section 2 of the Act of June 28, 1940 (54 Stat. 676) as amended, to enforce compliance with, or obedience to, or to enjoin violations of, or to enforce any liability or duty created by, any rule, regulation, order,

or subpoena issued under said subsection (a).

(b) *Service of process upon the Administrator.* Service of process upon the Price Administrator may be made by serving him personally, or by leaving a copy thereof at the Office of the Secretary, Office of Price Administration, Washington, D. C. In actions commenced outside the District of Columbia to obtain judicial review of rationing suspension orders issued under Procedural Regulation No. 4, service of process upon the Price Administrator may be made by personal service thereof upon the District Director or, in the latter's absence, upon the Acting District Director of the Office of Price Administration for the OPA district in which the administrative proceedings resulting in the suspension order were originally instituted. No other officer or employee of the Office of Price Administration, whether employed in the principal office in Washington, D. C., or in any regional or field office, is authorized to accept service of process on behalf of the Price Administrator or enter his appearance in any action or proceeding, except as herein provided.

(c) *Appearance for the Administrator in defensive suits.* The General Counsel or the Acting General Counsel and the Associate General Counsel or the Acting Associate General Counsel in charge of the Court Review, Research and Opinion Division are each authorized to appear for and represent the Price Administrator or the Office of Price Administration in any action or proceeding instituted against the Price Administrator or the Office of Price Administration in the Emergency Court of Appeals and in proceedings for the review of determinations of the Emergency Court of Appeals in the Supreme Court; and any of them may specifically authorize any attorney employed by the Office of Price Administration to appear for and represent the Price Administrator or the Office of Price Administration in any such

action or proceedings. The General Counsel or the Acting General Counsel, the Deputy Administrator in Charge of Enforcement, or the Acting Deputy Administrator in Charge of Enforcement, the Director of the Litigation Division or the Acting Director of the Litigation Division are each authorized to appear for and represent the Price Administrator or the Office of Price Administration in any other action or proceeding instituted against the Price Administrator or the Office of Price Administration; and any of them may specifically authorize any attorney employed by the Office of Price Administration to appear for and represent the Price Administrator or the Office of Price Administration in any other such action or proceeding.

[Effective Date]

Issued and effective this 7th day of September, 1944.

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#### **APPENDIX 6**

**Act Feb. 8, 1899**

**C. 421, 30 Stat. 822**

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That no suit, action, or other proceeding lawfully commenced by or against the head of any Department or Bureau or other officer of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death, or the expiration of his term of office, or his retirement, or resignation, or removal from office, but, in such event, the Court, on motion or supplemental petition filed, at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the Court may make such order as shall be equitable for the payment of costs.



## APPENDIX 7

Act Feb. 13, 1925

C. 229, 43 Stat. 936, 941

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 128, 129, 237, 238, 239, and 240 of the Judicial Code as now existing be, and they are severally, amended and re-enacted to read as follows:

\*   \*   \*   \*   \*

## Sec. 240.

Sec. 11(a) That where during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an insular possession of the United States, or of a county, city, or other governmental agency of such Territory or insular possession, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold such office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved.

(b) Similar proceedings may be had and taken where an action, suit, or proceeding brought by or against an officer of a State, or of a county, city, or other governmental agency of a State, is pending in a court of the United States at the time of the officer's death or separation from the office.

(c) Before a substitution under this section is made, the party or officer to be affected, unless expressly consenting thereto, must be given reasonable notice of the application therefor and accorded an opportunity to present any objection which he may have.

